CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS

Issue 2, 2020 | Volume 42, No. 2

Substantively Addressing Substance Abuse

By Shannon Wolfrum, CFLS

WHEN COUPLES DECIDE TO FILE FOR DIVORCE, THEY ALSO NEED TO CONSIDER THEIR ESTATE PLANS

By Heather Frimmer

The Case for a Harmonized California Court System

By David M. Lederman, CFLS

CALIFORNIA LAWYERS ASSOCIATION

FAMILY LAW NEWS Issue 2, 2020 | Volume 42, No. 2

TABLE OF CONTENTS

Message from the Chair

Stephen A. Montagna, CFLS

Well that escalated quickly. It's been over two months since a state of emergency was declared in response to Covid-19. My how things have changed. I remember what my calendar looked like back then. Multiple hearings scheduled on the law and motion calendar, new client consults, a smattering of trials, board meetings, and CLE programs. Ah yes, the life of a family law practitioner. Too busy to realize just how busy you are but also too busy to care. Then poof—just like that—all of it gone, rescheduled to some date in the future. There will be a future, right? Yes. There will be a future. However, I'm not so sure what that future looks like, especially for family law practitioners.

Since faced with the global pandemic, drastic measures have been undertaken to protect the health and safety of the public. Governor Newsom issued a statewide shelter in place/stay at home order, designed to combat the community spread of the disease. In her emergency order from March 23rd, Chief Justice Cantil-Sakauye made it very clear that the courts simply could not comply with the shelter in place restrictions, especially since many court facilities were ill-equipped to ensure social distancing. She's absolutely right. Think about the last time you were in court B.C.— "Before Covid-19." Just the simple process of going to court involves close personal interaction. We stand in lines next to people, we ride elevators huddled together with litigants and counsel, or take the stairs if we're masochists. At times, we conduct business in the hallway or in the law library, discussing important matters with our clients and opposing counsel. Depending on the layout of the courtroom, we even sit next to one another while we wait for our case to be called. We touch things. Constantly. We interact with one another, all of which is typically done in close proximity. Not anymore—at least not for the foreseeable future.

Even our day-to-day operations have changed as a result of Covid-19. Many law firms and practitioners have "temporarily" shut down their brick and mortar offices, choosing to work remotely from home. Advancements in technology have allowed us to carry on business–not necessarily as usual–but as much as possible under the circumstances. In-person office visits have been supplanted with appointments held via telephone or video conferencing. Heck, you can even change your screen background to make it look like you are on a beach! In recent years we've had the ability to appear in court by telephone, but now it seems more commonplace and not merely limited to people who live out of county. Some courts have even started to use video conferencing as a means to hold hearings since being shuttered. This is an extremely important step toward creating more access to the court system in the midst of this pandemic.

Yes, technology seems to be the answer in terms of ensuring a safe and efficient way to conduct our business. I think most of us would agree that it is a blessing to have these tools at our disposal. Afterall, it has preserved our ability to make a living, assist those clients in need, and above all else keep ourselves and those around us safe and healthy. We are "in this together;" yet, I cannot help but feel a deep sense of sadness with what I see becoming our new normal.

The truth is that I do not like the new normal. I feel a severe sense of loss when I look at how we must now operate in order to help flatten the curve. I am neither a doctor nor a politician. I have no insight as to the effectiveness on the measures taken, one way or the other. What I can tell you though, is that I miss the

personal interactions, the camaraderie between counsel and judicial officers as we work through a case together. I miss the ability to shake someone's hand or offer them a tissue when they're emotionally upset. I miss the nervousness of walking into a courtroom, the pressure of performing under high stress, my competitive urges satisfied through the adversarial process that is family law. You cannot replicate or evoke these emotions and feelings on a telephone or video call. You just can't. It's not the same. That being said, while I mourn the potential loss of practicing family law in the way I was accustomed to practicing "B.C." (Before Covid-19), I recognize the significant responsibility that comes with being a family law practitioner during this national emergency. We are, after all, the conduit through which our clients have access to the family court system. We have a responsibility to remain calm, vigilant, and to provide them with common sense advice while navigating the uncharted waters of family law in the midst of this pandemic.

There is no playbook on how to do this. Just ask the Chief Justice, who readily acknowledges that for these circumstances there is no guidance in history, law, or precedent. We are quite literally making this up as we go. I for one am up to the task, as is every member of the Family Law Executive Committee (FLEXCOM) and those at the California Lawyers Association (CLA). Since the tragedy hit, our team has been working around the clock to address the family law issues most affected by COVID-19. We've reached out to government officials and the Chief Justice to provide guidance where needed and seek feedback and direction where necessary. Every week there is a new program or webinar designed at giving up-to-date information on everything from managing a law practice while sheltering in place to practical solutions for parenting during the pandemic. We recently hosted a zoom meeting co-sponsored with the California Judges Association (CJA), where a panel of three family law judges from different parts of the state fielded questions and provided their perspectives on a variety of family law issues affected by the pandemic. There were over 850 registered viewers for this program. 850!

Ok, so maybe technology isn't all that bad, and, for the foreseeable future, practicing family law will require each and every one of us (including yours truly) to become more comfortable with the idea that we can't go back to the way things were. Change can be good. Change is seldom easy, but frankly we may not have a choice—especially if our health and safety and those around us remain at risk. I know I'm up for the challenge. I hope you'll join me in this endeavor–even if it takes place in virtual reality.

Stay Healthy.

Stephen A. Montagna, CFLS

California Lawyers Association Website:
http//calawyers.org

Family Law Section Website:
http://calawyers.org/Family

We solicit original manuscripts, which should be e-mailed to the *Family Law News* editor. Authors should provide sufficient information to permit adequate identification in the publication. The editorial staff reserves the right to edit submitted manuscripts as necessary. Edited manuscripts will be sent to authors for approval only where extensive revision might affect the article's substance. Publication deadlines do not allow time to send proofs to authors.

Manuscripts should be e-mailed to NATHAN@TLFAMLAW.COM. In most cases, we can grant reprint permission to recognized professional organizations.

Inquiries regarding subscriptions should be sent to Inquires regarding subscription should be sent to Erin Ravenscraft, California Lawyers Association, 400 Capitol Mall, Suite 650, Sacramento, CA 95814, erin.ravenscraft@calawyers.org (916) 516-1710.

Message from the Editor

Nathan W. Gabbard, CFLS

One of the simplest concepts to put into words is also simultaneously one of the most uncomfortable to accept: There are things that are out of our control. However, those things that are out of our control do not define who we are; how we react to them does.

In a time when staying – or at least feeling – connected has become an almost daily struggle, we are bringing you reliably relatable content from authors across the state. To access content from the *Family Law News* from anywhere with an internet connection, visit www.calawyers.org. Articles from past and present issues are available there and can be accessed by members of the Family Law section. Log on to stay connected!

This issue, once again, brings thoughtful and meaningful discussions. In late March 2020, during the COVID-19 pandemic, alcohol sales in the United States increased by 55%, as Shannon Wolfrum explains. Substance abuse impacts people of all genders, ages, ethnic backgrounds, levels of education, socio-economic situation and in all geographic locations. Ms. Wolfrum gives an overview of how to compassionately and realistically work with clients and the court in relation to substance abuse and child custody.

Reacting to the news of court closures due to the Covid-19 pandemic and the variety of different responses from the 58 counties across California, David Lederman shares suggestions on improving statewide efficiency. He proposes that the technology for a harmonized, efficient court system exists and can be tailored to the California Court System.

Vocational expert testimony, evaluation, and reporting can be an invaluable asset in family law cases regarding earning capacity, employment capacity, and determination of fair child and spousal support accountability. Jessica Bohne emphasizes tips and suggestions on how to prepare clients for what to expect when a vocational exam arises in their case.

Speaking of experts, in the second of his multi-part series, Mr. Stephen Hamilton dives deeper into expert witness discovery. Explore deposing expert witnesses designated by the opposing party and addressing ways to limit expert witness testimony at the time of trial based on a failure of an expert to disclose an opinion at the time of their deposition or inadequacies in the declaration regarding the expert's anticipated trial testimony.

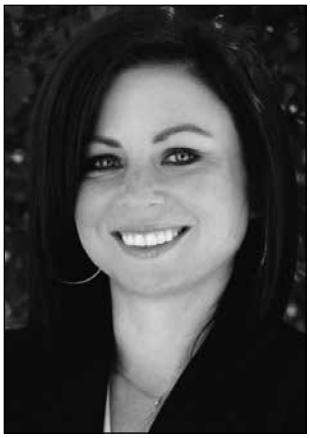
What happens if a spouse does not have sufficient mental capacity to seek a divorce? Justin O'Connell explains the applicable standard, the burdens of proof, and examples of relevant evidence for adjudicating the capacity of a party to seek a dissolution of his or her marriage. Additionally, mental capacity is a consideration in some estate planning devices. Heather Frimmer discusses some of these devices while elaborating on the cross-over issues of estate planning and divorce.

Keep your ego in check. Alphonse Provinziano describes the alter ego doctrine and applicability of piercing the corporate veil in dissolution of marriage proceedings as an equitable way to remedy party who has been wronged.

As always, we are grateful to our authors for their significant contributions. We hope you enjoy!

Vocational Evaluations: How They Can Assist with Child and Spousal Support Accountability

Jessica Bohne, M.Ed., CRC



Jessica Bohne has extensive professional experience in both the public and private sector, assisting individuals with disabilities to define their return to work objectives and reach their overall career goals in employment. She is currently the President of Bohne Vocational Services has been actively retained for her diverse expertise on multiple vocational related cases. She is an active member of IARP (International Association of Rehabilitation Professionals) as a Board Member and Mentee in the Forensic Vocational Evaluation section of the organization and specializes in Family Law and Worker's Compensation vocational evaluations.

The American family structure is more diverse than ever with regard to the earning capacity of spouses. The majority of married couples with children are dual income; however, there are many instances where a divorcing spouse will be out of work by mutual agreement, to raise children, or due to health reasons or disability. A spouse may also be unemployed involuntarily, e.g., termination, job change, or downsizing. They may also be purposefully out of work, underemployed, or hiding income, which is when imputed income is needed the most. When issues of spousal and child support arise, determining proper earning capacity for which either spouse should hold responsibility becomes an extremely important issue.

In these types of cases, it is beneficial to call upon a vocational expert to provide a thorough evaluation. A vocational expert is hired to provide professional evaluations, testimony, and opinions regarding the vocational aspects of a case and what a party is capable of earning in local labor markets. The evaluation should aim to determine the highest level of vocational functioning of a spouse, earning capacity, as well as the need for further training or education (if necessary).

A vocational evaluation can also be useful post-divorce when a change in circumstances occurs. A court can assign a higher imputed income to a spouse than they are presently earning in order to recalculate child or spousal support contributions. More often, family law judges refuse to impute income without the testimony of a vocational evaluator. If a spouse does not willfully submit to a vocational evaluation, then an appointment of a vocational expert evaluation may be made by noticed motion or by stipulation. California Family Code sections 4331(a-c) state:

> (a) In a proceeding for dissolution of marriage or for legal separation of the parties, the court may order a party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living.
>
> (b) The order may be made only on motion, for good cause, and on notice to the party to be examined and to all parties. The order shall specify the time, place, manner, conditions, scope of the examination, and the person or persons by whom it is to be made.
>
> (c) A party who does not comply with an order under this section is subject to the same consequences provided for failure to comply

with an examination ordered pursuant to Chapter 15 (commencing with Section 2032.010) of Title 4 of Part 4 of the Code of Civil Procedure.

Per Family Code section 4331, a typical vocational evaluation report and expert testimony should analyze and summarize findings on earning capacity, cost and duration of necessary education or training (if applicable), availability of geographically accessible current job openings, salary data, and expected job search duration. In my own experience, my conclusions and opinions are usually based on an in-depth interview with the spouse being examined, assessment to determine career values and interests, marketable skills and vocational options, and further testing to determine abilities. Labor market research should then be conducted by the vocational expert taking into account the individual's assessment results on employability and transferability.

Reasons to Use a Vocational Evaluation in a Family Law Case

As family, workplace, and labor market dynamics continue to change, the use of vocational expert testimony and reporting can be instrumental in providing updated, specific, and supported expectations concerning employability and earning capacity of either a supported or supporting spouse. Common reasons to seek a vocational evaluation include:

- Evaluating current and future earning capacity and employability of a spouse, including earning capacity versus actual income.
- Estimating realistic job search duration for an unemployed or underemployed spouse to find a job in the current labor market.
- Assessing job search and career exploration efforts, and assisting with identifying career options.
- Demonstrating a spouse's lack of education, skills, or earning capacity.
- Determining costs and duration of education or training for future career options.
- Identifying child-care costs related to spouse's return to work.
- Comparing actual earnings to potential earning capacity of a spouse.
- Establishing a spouse's lack of earning capacity and inability to meet support demands due to change in life circumstances and/or employment.
- Considering any additional changes in circumstances to a spouse's earning capacity post-divorce.

Vocational Expert Qualifications

Family Code sections 4331(e) and (f) refer to the use of the vocational examination and the qualifications of the vocational expert -

(e) In any proceeding under this section, the court may order either party to submit to an examination by a vocational training counselor. The examination shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination shall be on an assessment of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living.

(f) For the purposes of this section, "vocational training counselor" means an individual with sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market to qualify as an expert in vocational training under Section 720 of the Evidence Code.

A vocational training counselor shall have at least the following qualifications:

(1) A master's degree in the behavioral sciences.

(2) Be qualified to administer and interpret inventories for assessing career potential.

(3) Demonstrated ability in interviewing clients and assessing marketable skills with understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints.

(4) Knowledge of current employment conditions, job market, and wages in the indicated geographic areas.

(5) Knowledge of education and training programs in the area with costs and time plans for these programs.

Subsection (g) provides:

> (g) The court may order the supporting spouse to pay, in addition to spousal support, the necessary expenses and costs of the counseling, retraining, or education. By allowing for these costs, the law acknowledges that the earning capacity of a supported spouse who has been unemployed or underemployed during the marriage can be significantly enhanced by retraining or education. In general, a higher level of education increases earning capacity, enabling a formerly supported spouse to earn at a level closer to the marital standard of living. Counseling may also provide support for self-assessment, career exploration and job search as well as information on educational programs.

Most vocational experts hold master's degrees in rehabilitation counseling from a CORE[1] accredited program. The most respected certifications are: Certified Rehabilitation Counselor (CRC) and Certified Vocational Evaluator (CVE). It is highly recommended that counsel identify the expert's qualifications and review a curriculum vitae to determine that the expert is qualified to provide testimony prior to scheduling a vocational evaluation.

Preparing the Client for a Vocational Evaluation

A good point to stress to a client during the vocational evaluation process is that there should be no worry about having to "study" in order to prepare for the evaluation. It is important to answer questions honestly and completely—behavior analysis will most likely be performed by the evaluator and noted in the report. The following is a list of what to bring and/or consider in preparation for a vocational evaluation:

- Show up on time and be prepared to stay for 3 to 6 hours.
- Bring a current resume. If the client does not have a resume, they need to be prepared to discuss their educational background and work history in detail.
- If the client is in school or a training program, they need to bring all relevant details including a description of the program, costs, duration of the program, etc.
- If the client is currently in a job search, they need to bring written records of all job search related activities.
- Bring any relevant medical reports for the evaluator to review.

Conclusion

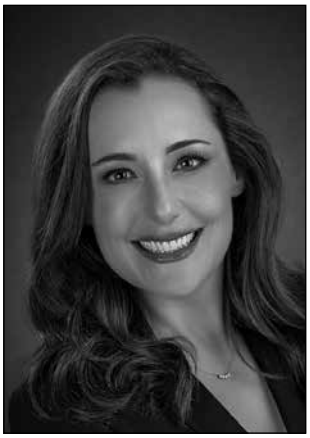
In summary, vocational expert testimony, evaluation, and reporting can be an invaluable asset in family law cases regarding earning capacity, employment capacity, and determination of fair child and spousal support accountability. With these tips and suggestions, counsel can prepare clients for what to expect when a vocational exam arises in their case.

Endnotes

1 Council on Rehabilitation Education

When Couples Decide to File for Divorce, They Also Need to Consider Their Estate Plans

Heather Frimmer



Heather Frimmer graduated from University of California, Santa Barbara with a Bachelor of Arts in Law and Society. She earned her Juris Doctor from Southwestern University School of Law in Los Angeles, California, and has been a member of the California State Bar since 2002. After welcoming twin boys in 2016, she focused her law practice on estate planning. Her goal is to make it easy for families to obtain the peace of mind that comes with knowing loved ones and assets will be taken care of regardless of what the future holds.

Divorce can take a long time. In California, the absolute minimum amount of time a divorce can take is six months. Complicated cases can take years. During this time, your clients need your guidance on what they can and can't do regarding their estate plans. This article is intended to provide you with a list of estate planning issues your client needs to be aware of when they are preparing for, or in the middle of, a dissolution proceeding.

Before or After Filing

Make sure your clients take an inventory of their estate plan. What documents have they executed? Where are the actual documents? They also need to take an inventory of their assets—both community and separate—for estate planning purposes, as well as the divorce. Where are their assets going if something were to happen to them today? They should make a list of who has been designated to receive property and whether or not they want to change those designations. Most married couples hire the same attorney to prepare their joint estate plan. Your clients should contact a separate attorney to review any divorce settlement and help prepare a new estate plan after the court signs the judgment.

What Happens if Your Client Becomes Incapacitated Before the Court Signs the Judgment?

Your clients should be aware that their incapacity documents are their power of attorney documents. They should have a financial power of attorney and a healthcare power of attorney. For married couples, the designated agent (the person selected to make decisions on the principal's behalf) is often the spouse. During the period of time after filing for divorce and before the judge signs the divorce judgment, anything can happen. Your clients should take a look at their incapacity documents and ask themselves the following questions:

1. Is your spouse listed as the initial agent?
2. What if you are in an accident and unable to make decisions for yourself?

If their power of attorney lists their spouse as the initial agent and there are no provisions that contemplate filing for divorce, the spouse may have the power to pull the literal plug if something happens to your client during the pendency of the divorce. The filing of divorce will have no impact on this.

Your client should also ask themselves questions about their finances. They should know how authority is triggered under their financial power of attorney. Is their financial power of attorney effective immediately or does it require one or more physicians to determine incapacity? If they executed a durable power of attorney, they may have given their spouse access to all of their financial accounts and assets now while they are still competent, this includes assets that are in their name alone. Your client likely does not want your spouse controlling their assets in any way, but unless they contemplated this situation, the filing of a divorce will not change the financial power of attorney.

A well-drafted power of attorney will include provisions contemplating filing for divorce. For example, an attorney could insert language stating that in the event one of the spouses files for divorce (the key here is for the *filing* to be the trigger, not the judgment), then the spouse

designated as the agent shall be considered to have pre-deceased the principal. In this case your client will want to make sure they selected an appropriate secondary designation. Whether their power of attorney documents include such language or not, the best course of action is to revoke the old power of attorney and execute a new power of attorney. A revocation should be either witnessed or notarized and should state essentially the following:

> I, _____ of _____ hereby revoke the power of attorney granted by me on _____ which appointed _____ as my attorney-in-fact. _____ no longer has authority to act on my behalf and any authority previously conferred on _____ by said power of attorney is revoked, cancelled and terminated as of this date _____.

Make sure to check the statutory guidelines requiring you to provide the notice of revocation to the other side before advising your client to revoke their power of attorney or any other revocation.

What happens if your client dies before the court signs the judgment?

Now that we've discussed incapacity, we need to discuss what happens upon your client's death. In California, once someone files for divorce both parties are prevented from changing any document that would transfer property. This includes transfers by trust, will, and beneficiary designation. Your client cannot revoke or modify a trust or change or remove any life insurance, retirement account, and/or pension beneficiaries without their spouse's consent. If your client has a trust or will that leaves all of their property to the surviving spouse, and your client dies before the judge signs the divorce judgment, then all of their property goes to the surviving spouse. If your client's spouse is listed as the primary beneficiary on your client's life insurance policy and/or retirement accounts, they cannot change these designations until after the court signs the divorce judgment. Filing for divorce triggers an automatic restraining order precluding either party from changing these designations. If your client comes to you for advice prior to filing for divorce, and they have a trust or will and/or beneficiary designations that leave their property to their spouse, you should advise them to speak to an attorney about modifying those documents before filing.

After the Court Signs the Order

Once the divorce is finalized, your client must revisit their estate plan again and see what needs to be updated in light of the divorce. The following are some topics that should be included in your client closing letter and/or should be discussed with your client after their judgment is entered.

With respect to your client's trust or will, if they had a trust or will leaving property to their former spouse and then to their children, your client will want to update that so that the children receive the property instead. If your client has minor children, unless there is a serious reason why that person should not be guardian, the other parent will almost always be appointed guardian of the children. If your client leaves property directly to the minor children, then their former spouse may have control over that property until the children turn 18. To protect against their former spouse controlling their property while the children are minors, the client can create a trust to hold the minor children's property, naming someone they trust as the Trustee rather than the former spouse. This way, your client will know that their property will pass directly to the children.

With respect to beneficiary designations, your client cannot assume that the divorce judgment alone will change any of the powers of attorney, beneficiary designations or property transfers. If your client's former spouse is listed as a beneficiary, then he/she will still receive those funds even after your client is legally divorced unless your client actively changes their beneficiary designations. Federal law requires the plan administrators for retirement accounts to turn funds over to whomever is listed as the beneficiary and no one else regardless of any outside facts. The beneficiary designation controls. In order to avoid your client's life insurance proceeds or retirement funds going to their former spouse, your client should contact the plan administrator and request new beneficiary designation forms, execute those new designation forms and send them back to the plan administrator.

"Piercing the Corporate Veil" in Family Law Cases: The Alter Ego Doctrine and Available Equitable Remedies

Alphonse F. Provinziano, CFLS

Alphonse Provinziano is a well known Beverly Hills Divorce and Family Law attorney. Mr. Provinziano is a Certified Family Law Specialist by the State Bar of California, Board of Legal Specialization. A graduate of UC Berkeley and Hastings Law School, he is the principal of Provinziano & Associates. For more information visit: http://www.Provinziano.com

During the divorce process in California, the assets of the community[1] are accounted for through the use of financial disclosure forms for the purpose of dividing the assets. All property acquired during marriage from marital funds is considered community property. However, there are times when assets that would usually be owned by the community are held or acquired by another entity, whether by trust, by a corporation, or by a limited liability company. Determining whether or not those assets should properly be part of the community, rather than the separate property of the business, requires a factual analysis of the case in question through the framework of the alter ego doctrine. If this doctrine applies, then the court would "pierce the corporate veil" to disregard the separate existence of the corporate entity and to find an equitable solution for the wronged party, with the potential for a significant impact on the party that wrongfully withheld community property.

The Alter Ego Doctrine

The purpose of the alter ego doctrine, as discussed in the case *Communist Party v. 522 Valencia, Inc.*, , is when:

> a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation.[2]

The court then elaborated on the doctrine, noting that the two main requirements in determining whether or not the alter ego doctrine applies are:

1. there is such a unity of interest and ownership between the corporation and the individual or organization controlling it that their separate personalities no longer exist; and
2. failure to disregard the corporate entity would sanction a fraud or promote injustice.[3]

While this two-pronged framework is relatively straightforward, determining the meaning of "unity of interest" is a fact-intensive determination that requires an in-depth analysis of the relationship between the opposing party spouse and the company in question. The court in *Associated Vendors, Inc. v. Oakland Meat Co*., listed a variety of factors used in determining whether or not to apply the alter ego doctrine, and to then subsequently "pierce the corporate veil," based upon their review of various court cases. While no one factor was deemed controlling, the *Vendors* court noted that in all the cases, several of the factors were present.[4] These factors are depicted on the graph below.

A) Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses.	B) Treatment by an individual of the assets of the corporation as his or her own.	C) Failure to obtain authority to issue shares or to subscribe to or issue shares.	D) Holding out by an individual that he or she is personally liable for the debts of the corporation.	E) Failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entity.
F) Concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities.	G) Use of a corporation as a mere shell, instrumentality, or conduit for a single venture or the business of an individual or another corporation.	H) Failure to adequately capitalize a corporation, the total absence of corporate assets, and undercapitalization.	I) Use of the same office or business location; the employment of the same employees or attorney.	J) Identical equitable ownership in two entities; identification of the equitable owners of two entities with their domination and control; identification of the directors and officers of two entities in the responsible supervision and management; sole ownership of all of the shares in a corporation by one individual or the members of a family.
K) Disregard of legal formalities and the failure to maintain arm's length relationships among related entities.	L) Use of the corporate entity to procure labor, services, or merchandise for another person or entity.	M) Diversion of assets from a corporation by or to a shareholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another.	N) Contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions.	O) Formation and use of a corporation to transfer to it the existing liability of another person or entity.

An important and oft-cited California case to involve both family law matters and the alter ego doctrine is *Kohn* v. *Kohn*. This court, which disregarded the corporate entity to the extent its purpose was to lower the husband's assets for alimony purposes, summarized the law in California as such:

> although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud, protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical." The issue is not so much whether, for all purposes, the corporation is the "alter ego" of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.[5]

Sanctions Under California Family Code section 1101 due to Piercing the Corporate Veil

There is an unpublished case, while not controlling, where at the trial court level and on appeal the facts supported an extreme equitable remedy to counteract the actions of the husband meant to deprive the community of a valuable asset by awarding the wife the entire house based on piercing the corporate veil and the alter ego doctrine. In *Cerrato v Cerrato* (unpublished),[6] the husband incorporated his separate contractor business shortly after marriage in a now-defunct way of operating with shares issued to the "bearer" of stock certificate. Title to the family home was purchased during the marriage with title vested in the name of the corporation. Two days after

purchasing the home, the husband signed a promissory note for $150,000 payable by the corporation to himself and secured by a short-form deed of trust (DOT) listing the corporation as trustor. However, the corporation was also listed as beneficiary in the DOT and the husband's friend, Lyle Harmer, was designated as trustee. The DOT was not recorded at that time.

During the marriage, the husband paid for the mortgage with his personal account and through the corporation's bank account. He also admitted to comingling personal and business funds and to not maintaining the formalities of a corporation. The husband ran the corporation and other corporate entities out of the family residence. As for the funding of his business, he supported the family by selling his assets. For example, he sold his Ferrari and put the funds in his personal bank account and sold his Yacht and put that money into another corporation. However, the husband had no record of where the money from the sales went or that the proceeds of either sale went toward the corporation or the family residence.

When the wife filed for divorce roughly fourteen years after the purchase of the house, as we all know, one of the standard ATROs restraining orders on the back of the divorce summons prohibited the husband from encumbering or transferring any real property that was subject to the community. However, the husband then recorded the DOT in the amount of $450,000 and prepared an assignment of the DOT to his friend Harmer without signing or recording it at that time. Prior to that, the husband had also transferred the family residence from the corporation to himself by quitclaim deed and without consideration. The wife was unaware of these actions and the husband recorded the deed later that year.

Three years later, and well into the divorce proceedings, the husband signed and recorded the assignment of the DOT to Harmer. There was a notation on the DOT stating that the amount of $450,000 was due in a lump sum approximately on year from the date of recordation. The purpose of the husband's actions was to give up the entire value of the promissory note to Harmer, such that Harmer would receive that amount from the proceeds of the sale of the family home.

In deciding to award the wife title to and 100% interest in the family residence, the trial court primarily relied upon Family Code section 1101 for an equitable remedy, which states:

> (a) A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.
>
> (b) A court may order an accounting of the property and obligations of the parties to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage.

The trial court also found, among other things, that the down payment for the family residence did not come from the husband's separate property acquired prior to marriage, that no real corporation was established because the articles of incorporation were improper, and that the husband violated his fiduciary duty to his wife by encumbering the residence after being ordered not to do so in temporary restraining orders. The Court of Appeals noted: "applying section 1101, the [trial] court ordered the short form DOT and the assignment of the DOT to Harmer set aside and rescinded and Kathleen's name placed on the title of the residence as its sole owner with 100 percent of the residence awarded to her."[7] After the judgment of the trial court, the husband refused to move from the residence and attempted to stay or vacate the judgment. This forced the wife to file an ex parte for writ of possession of the residence. While the motions were pending, Harmer appeared before the court seeking to vacate, reconsider, or stay the judgment. At the hearing, the court denied the motions of the husband and Harmer but granted the wife's request for possession. While the Court of Appeals affirmed the revisions of title and ownership of the family residence to the wife, the wrinkle in this case was the third-party Harmer, who did not make an appearance at the trial court level because service for joinder was defective. However, the Court of Appeals found the error to be harmless because the doctrine of merger had extinguished the deed of trust and Harmer had no interest in the community property. There was no lien left on the family residence and therefore, the assignment

to Harmer was empty and Harmer received nothing. This case highlights the lengths a party will go to hide assets from the community and even other third-parties, and the extraordinary equitable remedies available under Family Code section 1101 to remedy the wronged spouse, even to the extent of reforming title and awarded the entire house with all its equity to her. While the failure to properly join the third-party in this case was harmless error, it could complicate the available remedies depending on the nature of the case and the remedy sought.

California Family Cases Allow the Alter Ego to Be Pierced

The court in *In re Marriage of Dick*[8] reviewed an appeal from the wife on the judgement of dissolution based upon a lack of jurisdiction over the immigrant husband and the husband's appeal from an order awarding attorney's fees and spousal support. Setting aside the jurisdiction issues in this case, the court reviewed the evidence presented about the husband's assets and income in affirming the decision of the trial court.

The Court of Appeals cited authority that found investments and other assets could be used in addition to income to calculate support, and that in this case the trial court found the husband to have extensive assets and non-salary income, in excess of $20,000,000, that he was able to use to pay for spousal support. The court also noted that although the husband testified to the trial court that he was unable to pay the amount ordered and had no hidden assets, his testimony was not deemed credible by the trial court and there was ample evidence to support that finding. The critical finding in this case was that:

> husband had organized his assets so that he had created "a labyrinth of trusts and corporations designed by him ... to shield and protect [him] from creditors.... [A]lthough the evidence fails to disclose any assets actually standing in the name of [husband], he has access to and control of extensive assets...." The court concluded "that the transactions by which [husband] transferred ownership of assets from his name to various off-shore trusts and corporation[s] were for the purpose of tax avoidance and to create a shelter from creditors, and that for the purpose of this proceeding, they must be disregarded."[9]

Particular examples of the husband's schemes included holding title to a manor house in a trust that was actually in a roundabout way under his control, and residing in a home in Denver that was owned by a separate entity, yet the husband claimed it to be his sole residence in a letter to a bank to obtain a loan, among other factors. The trial court also found the husband had "sold" millions of dollars of assets for promissory notes to his former secretary, which were then used as collateral on a loan from an entity that never attempted to collect on the loan when it was past due.

The trial court also found the:

> "[husband] has an obsession with the concept of having no indicia of ownership of property standing in his name, yet controlling and using said property as if it were his own." As the court noted, assets as disparate as a doll collection, automobiles, condominiums used by husband's parents and two Palm Springs houses, one of which husband used as his residence, were all held in a network of related trusts.[10]

As a result of all the evidence that was before the trial court, the Court of Appeals found that the temporary alimony awarded to the wife in the amount of $35,000 a month was supported. Although this case did not explicitly discuss the alter ego doctrine, it recognized that the husband had access to and control of extensive assets such that the wife's temporary alimony award was reasonable. To support its determination, the court restated the law that a trust created for the purpose of defrauding others is illegal and may be disregarded, and cited the *Kohn* court with similar logic to disregard the corporate entity.[11]

In a more current case from 2017, *In re Marriage of Berman*,[12] the Court of Appeals affirmed the decision of the trial court, which found the husband still liable for spousal support payments to his ex-wife in spite of transferring his business. The husband had filed a request with the court to terminate spousal support for, among other reasons, the fact that he no longer owned his business, a private investigation and security firm. In reviewing the facts of the business transfer, the trial court noted that the husband had transferred his business to his current wife for no consideration and inferred that it was done, in part, to allow him to claim a reduced income. His claims to the contrary through his declarations and papers filed with the court were not deemed to be credible by the trial court, and therefore were not a true "material

change" to justify modification of the spousal support order.

The *Berman* court cited both *Kohn* and *Dick* for the applicable law that structuring assets in such a way to avoid financial obligations allows the court to look beyond the form of ownership and to make a determination of that party's actual control over the assets.

The final case to be discussed does not cite the *Kohn* decision, but rather discusses the alter ego doctrine in a limited set of circumstances. *In re Marriage of Imperato*, was a case involving the valuation date of community property in light of recent legislation and the appreciation in value of the corporation during the time between separation and trial. The important analysis in this case was the acknowledgment of:

> the right of the courts to disregard the corporate entity at the urging of a stockholder in special situations, providing the facts support the *alter ego* theory. We believe a special situation exists when a husband and wife who are the sole stockholders of a corporation are dissolving their marriage and the other factors mentioned exist. One reason for justifying the *alter ego* doctrine is that it prevents injustice. If no third parties are affected, and the husband and wife have not treated the corporation as a separate entity, logic and fairness would permit the court to disregard the corporate entity when evidence offered by either party justifies such a finding, and it would enable a fair apportionment of the property.[13]

Treatment in Other Jurisdictions

Family law cases involving the alter ego doctrine are few and far between. Therefore, to highlight the factual circumstances that give rise to the use of the doctrine and "piercing the veil," saying that a business is not a separate entity from the owner/shareholder, cases from other jurisdictions are included for analysis in this article.

Coming from the state of Texas, also a community property state,[14] are two cases that highlight the extreme injustice that would result without the use of the doctrine. In particular, it should be noted in these cases that there was essentially nothing left for the community at the time of divorce, as it had been transferred to the corporation to the detriment of the community.

In *Spruill v. Spruill*[15], the Court of Appeals affirmed the judgement of the trial court and reviewed the pertinent facts of the case. In this instance, the wife filed for divorce against her husband and joined as a defendant the husband's primary corporation. The husband was a mobile home dealer, and although he owned 48% of the capital stock prior to the marriage, he used community funds after the marriage to acquire the balance of the shares of capital stock. The husband also had a 50% stock ownership in four other corporations that manufactured or sold items related to mobile homes. Importantly for this case, the husband used his primary corporation and the other corporations for all of his ordinary living expenses. The primary home was owned by the corporation, and all other items usually associated with the community estate, motor vehicles and furniture, among other assets, were owned by the corporate entities.

Roughly the same time as the divorce, the husband's business went through a downturn and he executed several promissory notes to his business partner in New Orleans, pledging all his corporate stock as security. The partner then later filed suit to foreclose on all of the corporate stocks owned by the husband and wife, and when he obtained judgment the community estate was wiped out. This included losing the house, money, vehicles, furniture, and items related to the mobile home business. Curiously, the husband was hired by the partner to act as president of his former primary corporation, with the excuse that they remained friends. The husband then executed a second lien note and deed of trust for their marital home and moved out to live with a girlfriend.

The trial court determined that the husband and his primary corporation were one and the same, and that the corporation became the alter ego of the husband. The court also found the actions taken by the husband to impoverish the company were done to create a false community debt that would defraud the wife of her community interest in the stock. As a remedy, the trial court awarded all of the husband's interest in the corporate stock of the primary corporation and the other four subsidiary corporations to the wife, as well as all corporate records and personal property of those corporations. The wife and minor children were also awarded sole use and occupancy of the home and all household items contained within the home.

Compared to the *Cerrato* case, the fact pattern in *Spruill* is similar in that extreme lengths were taken by the defendant to dispose of community assets and deprive the other spouse of any assets. One difference between the cases is that in *Cerrato*, the husband's corporation did

not seem to have any business purpose other than its use as a shelter of assets to defraud the wife and third-parties. In the *Spruill* case, the husband had a legitimate, and for a time successful, business in which he commingled his community assets.[16] It is doubtful that fact alone would be enough to support using the alter ego doctrine on the corporation and the husband; rather, the husband's egregious actions in impoverishing the corporation, which held the assets that would normally be part of the community estate, created the injustice that allowed for this remedy.

Another Texas case involving the alter ego doctrine was *Zisblatt v. Zisblatt*. In this case, almost all assets that would be usually part of the community were owned by the husband's corporation. The wife in this case also pled for the community's right to reimbursement, but the court noted that the doctrine of alter ego was an equitable remedy apart from the rule of reimbursement.[17] In finding the husband and corporation were one and the same, the Court of Appeals stated the evidence showed that the corporation, other than at its creation, never had a separate existence from the husband. The husband deposited all of his commissions from sales into the corporation's bank account, and the corporation's only source of income was the husband's commissions. In summarizing their rationale for the use of the alter ego doctrine, and for finding that most of the assets of the corporation were actually part of the community estate, the court stated:

> [i]n the present case, we have a spouse who has attempted to change the character of earned income by forming a corporation and then depositing such income into the corporate accounts. [The Corporation] was nothing more than a series of accounts into which were deposited the majority of the commissions earned by [the husband] over the course of the marriage. This is clearly a fraud on the rights of the community.[18]

Finally, a case from Ohio touches on the Alter Ego Doctrine in an alimony proceeding, after the divorce has been finalized. In *Saeks v. Saeks*[19] the parties divorced in 1981 and alimony received by the wife was based on the gross income of the husband. While the husband had operated as a single proprietorship for many years, he incorporated his business in 1983 yet was the sole shareholder, director, and officer. After incorporation, the corporation received commissions in the amount of roughly $85,000 and the husband was paid approximately $70,000 in commissions while receiving a paltry salary of roughly $6,000. This resulted in the wife receiving approximately $10,000 less than she had received the year prior.

The husband testified that while he knew incorporation of his business would result in reduced alimony to his wife, this was not the primary reason for incorporating his properly-formed corporation. As a defense, the husband argued that since no fraud was intended on his part, the assets of the corporation should not be imputed to him and only his income should be used to calculate alimony. The Court of Appeals, in upholding the decision of the trial court, noted that the corporation had no separate identity from the husband, who exerted complete control, and that recognizing the corporation as a separate entity would lead to an inequitable result or loss of rights by a third party. The key factor in this case for the trial court was the fact that the husband was aware that incorporation would reduce the alimony to wife, which went against the intent of the parties in the separation agreement that was incorporated into their final decree of dissolution of marriage. It should also be noted that the trial court was aware of the fact that the husband could now manipulate his personal gross income, which was the basis for alimony in their agreement, and that the husband had testified:

> that the only reason he personally received any commissions at all as opposed to them all being paid to the corporation was the refusal by some insurance companies to license the corporation as their agent. Thus, had [the husband] fully had his way, his personal gross income would have only been the salary of $5,850 paid him by his corporation.[20]

As a remedy, the *Saeks* court upheld the judgment of the trial court in awarding the wife a sum that represented the difference between what she had received as alimony and what she would have received as alimony had the husband's income included the commissions paid to his corporation.

Both the *Zisblatt* case and the *Saeks* case, although not controlling law, highlight factual scenarios to be mindful of when arguing for this equitable remedy. In both cases, the husbands were able to manipulate their income such that it went to the corporation, thus depriving

the other spouse of community assets in *Zisblatt* and of proper alimony based on gross income in *Saeks*.

In cases where assets usually found as part of the community, including the family residence and income, are owned by a business owned or controlled by the opposing party, more investigation should be performed to ensure the community is not being fraudulently deprived of assets. Although each case and the subsequent equitable remedy is fact specific, the cases discussed above highlight the various ways in which the business-owning parties attempt to conceal assets from their spouses. Observing the proper formalities to keep a business separate are disregarded in these types of cases, and reviewing the business of the opposing party through the factors listed by the *Vendors* court is a key step toward satisfying the alter ego doctrine.

Upon successful proof, the available remedies are often extreme in nature toward the spouse concealing assets in business entity or trust, and under the doctrines of Family Code section 1101 can result in remedies such as a transfer and reformation of title in favor of the defrauded spouse.

Endnotes

1 *See* Cal. Fam. Code § 760.

2 Communist Party v. 522 Valencia, Inc., 35 Cal. App. 4th 980, 993 (1995).

3 *Id.*

4 Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 840 (1962).

5 Kohn v. Kohn, 95 Cal. App. 2d 708, 718 (1950).

6 Cerrato v Cerrato, No. G051775 (Cal. Ct. App.2017) (unpublished).

7 *Id.* at 7.

8 *In re* Marriage of Dick, 15 Cal. App. 4th 144 (1993).

9 *Id.*at 161.

10 *Id.* at 164.

11 *Id.* at 161-62.

12 *In re* Marriage of Berman, 15 Cal. App. 5th 914 (2017).

13 *In re* Marriage of Imperato, 45 Cal. App. 3d 432, 440 (1975).

14 Tex. Fam. Code Ann. § 3.002.

15 Spruill v. Spruill, 624 S.W.2d 694 (Tex. Ct. App. 1981).

16 *Id.* at 696.

17 Zisblatt v. Zisblatt, 693 S.W.2d 944, 948, 952 (Tex. Ct. App. 1985).

18 *Id.* at 958.

19 Saeks v. Saeks, 24 Ohio App. 3d 67 (Ohio Ct. App. 1985).

20 *Id.* at 70-71.

FAMILY LAW

CALIFORNIA LAWYERS ASSOCIATION

SAVE THE DATE

FAMILY LAW ESSENTIALS 2020

A Family Law Case from Intake to Judgment

August 29, 2020

8:30 am - 4:30 pm

An esteemed panel of bench officers and attorneys will walk you through the highlights of the substantive law, as well as outline numerous practice pointers to help navigate your way through a family law case from initial filings through judgment. Topics to include basics for new attorneys, jurisdiction, initial filings, custody and parenting planning, child support, spousal support, community property and fiduciary duties, and judgment paperwork.

This program is geared towards newer family law practitioners and will be a great refresher course for those who have been in practice for longer.

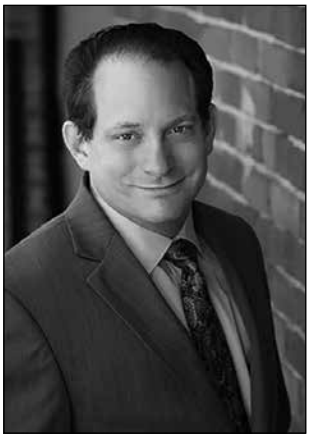
Speakers:
Hon. Michael J. Convey
Hon. Sue Alexander
Peter M. Walzer, CFLS
Leena S. Hingnikar, CFLS

This program will be held by webcast. A web cast address will be provided to all registrants.

Earn 6 hours of MCLE - includes Legal Specialization in family law

The Case for a Harmonized California Court System

David M. Lederman, CFLS



David M Lederman is a Past Chair of the State of California Bar Association, Family Law Section (FLEXCOM), Past Legislation Chair for FLEXCOM, and the Current Technology Director for the Association of Certified Family Law Specialists; current President Elect for the Contra Costa Family Law Section and is rated as a SuperLawyer by SuperLawyer.com. Mr. Lederman is a frequent lecturer on family law topics and speaks Mandarin Chinese.

On March 13, 2020,[1] I was conferring with a clerk of the Contra Costa family court regarding an order I needed to pick up. Advised that the order was ready, I said thank you and I'd have someone pick it on Monday. The response I received was that I had better send someone to pick it up that day because the court would be closed the following Monday. "Excuse me?" That was my notice of court closure. As a practitioner in Contra Costa County with a busy hearing/ trial schedule, I learned that all of my hearings and trials were going to be vacated. Following this notice, the courts struggled. On March 16, 2020, the Director of Health Services for Contra Costa County issued its order to shelter at home in response to the COVID-19 pandemic. On March 19, 2020, Governor Newsom issued his statewide order that "all individuals living in the state of California… stay home or at their place of residence except as needed to maintain continuity of operations of the federal infrastructure sectors…."

By Monday the 16th my office was 100% virtual, staff members were instructed to work remotely from home, the phone system was forwarded to mobile phones, and we had continuity of operations. Our infrastructure was designed to be scalable and untethered to physical geography. Our data exists on a secure cloud data farm. There was no difference in our access to internal systems and resources – we literally turned off the lights in our physical offices and reopened as a virtual firm the next day.

In the modern practice of law – Distance is Dead. The court system does not reflect the modern practice of law.

The response of different courts across California's fifty-eight counties ("The 58" hereinafter) varied considerably. As of this writing (April 2020), some courts are completely closed, while others are only offering limited services. The timelines for closure or limited services are all over the map, as you can see at https://calawyers.org/court-updates/. Policy is set by the presiding judge of each court, who must obtain the approval of the Chairperson of the Judicial Council (Chief Justice of the California Supreme Court) to allow them to modify their operations. Government Code section 68070 states: "Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." California has fifty-eight counties. This means up to fifty-eight sets of local rules, fifty-eight disparately organized filing systems, fifty-eight docketing systems, fifty-eight case management systems, fifty-eight computer systems (at least), and… well, this list could go on.

The California Government Code section 68115 states that during time of

> war, an act of terrorism, public unrest or calamity, epidemic, natural disaster, or other substantial risk to the health and welfare of court personnel or the public, or the danger thereof, the destruction of or danger to the building appointed for holding the court, a large influx of criminal cases resulting from a large number of arrests within a short period of time, or a condition that leads to a state of emergency being proclaimed by the President of the United States or by the Governor pursuant to Section 8625, threatens the orderly operation of a superior court location or locations within a county or renders presence in, or access to, an affected court facility or facilities unsafe, *the*

presiding judge may request and the Chairperson of the Judicial Council may, notwithstanding any other law, by order authorize the court to do one or more of the following[2]

- Hold sessions anywhere within the county.[3]
- Transfer civil cases pending trial in the court to a superior court in another county.[4]
- Declare that a date or dates on which an emergency condition, as described in this section, substantially interfered with the public's ability to file papers in a court facility or facilities be *deemed a holiday for purposes of computing the time for filing papers with the court* under *sections 12* and *12a of the Code of Civil Procedure*. This paragraph applies to the fewest days necessary under the circumstances of the emergency, as determined by the Chairperson of the Judicial Council.[5]
- Declare that a date on which an emergency condition be deemed a holiday for purposes of computing time under those statutes. This paragraph applies to the fewest days necessary under the circumstances of the emergency, as determined by the Chairperson of the Judicial Council.[6]
- Extend the time periods provided in *sections 583.310* and *583.320 of the Code of Civil Procedure* to bring an action to trial. The extension shall be for the fewest days necessary under the circumstances of the emergency, as determined by the Chairperson of the Judicial Council.[7]
- Extend the duration of any temporary restraining order that would otherwise expire because an emergency condition, as described in this section, prevented the court from conducting proceedings to determine whether a permanent order should be entered. The extension shall be for the fewest days necessary under the circumstances of the emergency, as determined by the Chairperson of the Judicial Council.[8]
- Extend the time period provided in *section 825 of the Penal Code* within which a defendant charged with a felony offense shall be taken before a magistrate from 48 hours to not more than seven days, with the number of days to be designated by the Chairperson of the Judicial Council.[9]
- Extend the time period provided in *section 859b of the Penal Code* for the holding of a preliminary examination from 10 court days to not more than 15 court days.[10]
- Extend the time period provided in *section 1382 of the Penal Code* within which the trial must be held by not more than 30 days.[11]
- Within the affected area of a county during a state of emergency resulting from a natural or human-made disaster proclaimed by the President of the United States or by the Governor pursuant to *section 8625 of the Government Code* , extend the time periods provided in *sections 313 , 315 , 632* , and *637 of the Welfare and Institutions Code* , with the number of days to be designated by the Chairperson of the Judicial Council.[12]

For the period of the COVID-19 pandemic, Governor Newsom expanded the chief justice's authority by Executive Order N-38-20. In that document, Governor Newsom ordered, among other things, "To the extent Government Code section 68115 or any other provision of law imposes or implies a limitation on the subject matter the Chairperson of the Judicial Council may address via emergency order or statewide rule issued pursuant to section 68115, that limitation is suspended."[13] This is intended to "remove any impediment that would otherwise prevent the Chairperson from authorizing, by emergency order or statewide rule, any court to take any action she deems necessary to maintain the safe and orderly operation of that court."[14] This was a prudent course for the Governor to take. The courts need leadership during this crisis. However, this order does not go far enough.

The chief justice needed to cobble together a functioning court system in the middle of an existential crisis. In reviewing the actions of the court system, it is important to note and appreciate the herculean efforts made by the chief justice and The 58. In my county, the judicial officers reached across the well to partner with our local family law section to develop rules and procedures to provide services to those that needed them the most. The judges, the clerks, and court administrators exhibited a tremendous work ethic to try to "build the plane as it was crashing into the ground," which is how this process

was described by the court administrator. These efforts were duplicated throughout The 58 as each court sought permission to create their own set of emergency rules and create their own processes for administering their separate rules. Questions that The 58 needed to decide independently: Do we accept direct email filing? Do we use a physical "drop box" for filing of emergency pleadings? What gets tracked? What gets entered into what type of database?

California is the central technological hub of the world. Zoom, Apple, Cisco, Oracle, Google, simply starts the list of technology companies in California, yet to transfer a case from one county to another requires months of waiting and the transfer of a physical file and conversion to a new docketing system. When faced with the COVID-19 pandemic, the court system simply collapsed. It has no cohesive infrastructure. It is too decentralized. It is a mess.

The technology for a harmonized, efficient court system exists and can be tailored to the California court system. At minimum, the following improvements are needed, and should be singularly adopted uniformly throughout The 58. This will provide the court system with the ability to respond quickly and cohesively in a crisis and at a cost savings through economies of scale. This calls for a significant alteration of the court system. It requires detail logistical workflow planning with input garnered from each of The 58. At its most basic minimum, the state must develop the following:

- A single electronic docketing system interrelated between the counties.
- A single consistent electronic filing system with web-based access to filings by the public;
    - This will require a study of workflows and the development of a standardized document naming and identification system.
- A single system and implementation protocols for virtual court hearings and trials in addition to live trials.

There is nothing new or novel about the recommendations above. In 2006 the Administrative Office of the Courts in conjunction with the California Department of Health Services published a report titled Epidemics and the California Courts.[15] The report recommended an action plan by The 58 and described most of the same technological adoptions I recommend here. The 58 cannot do this as independents. The court's evolution must be cohesive and centralized. Government Code section 68070 was added by statute in 1953. It was last amended in 1999. Today's world, the risks the courts face and the technologies available to deal with these risks have evolved. It is time for the court system to evolve as well.

Endnotes

1 The views expressed in this article do not necessarily represent the views of the California Lawyers Association or any association or organization connected with the author.

2 Cal. Gov't Code § 68115(a) (emphasis added).

3 Cal. Gov't Code § 68115(a)(1).

4 Cal. Gov't Code § 68115(a)(2).

5 Cal. Gov't Code § 68115(a)(4) (emphasis added).

6 Cal. Gov't Code § 68115(a)(5).

7 Cal. Gov't Code § 68115(a)(6) (emphasis added).

8 Cal. Gov't Code § 68115(a)(7).

9 Cal. Gov't Code § 68115(a)(8) (emphasis added).

10 Cal. Gov't Code § 68115(a)(9) (emphasis added).

11 Cal. Gov't Code § 68115(a)(10) (emphasis added).

12 Cal. Gov't Code § 68115(a)(11) (emphasis added).

13 Exec. Order N-38-20 (Cal. March 27, 2020).

14 *Id.*

15 Judicial Council of Cal., Epidemics and the California Courts (2006), https://www.cdph.ca.gov/Programs/CCLHO/CDPH%20Document%20Library/EpidemicsInTheCourts.pdf.

Challenging Capacity

Justin O'Connell, CFLS

Justin M. O'Connell is a partner at Cavassa O'Connell, located in Monterey, California, where his practice includes family law and civil litigation. Mr. O'Connell is a Certified Family Law Specialist, served as a Commissioner on the California State Bar Family Law Advisory Commission from 2012 to 2015, and is currently the Legislation Chair of the California Lawyers Association Family Law Executive Committee (FLEXCOM). He has been the professor of Property Law at the Monterey College of Law since 2007, and a member of the Alternative Dispute Resolution Executive Committee for the Monterey County Superior Court since 2013.

On occasion, the trial court must adjudicate the capacity of a party to seek a dissolution of his or her marriage. This situation most often arises where the respondent does not desire to end the marriage and contends the petitioner does not have the capacity to do so.[1] When faced with this task, the trial court must focus on the applicable standard, the burdens of proof, and the relevant evidence.

There are many standards of capacity: to contract, to make a will, to make a trust, and to take other actions. However, the standard of capacity to end one's marriage is a unique measure due to the type of decision one is making. This is because terminating such an intensely personal relationship is accompanied by a profound emotional impact and constitutes the severance of an inter-personal bond that individuals and our society hold to be of enormous significance. To properly adjudicate the capacity to end one's marriage, the trial court should be aware of the applicable capacity standard, the burden of proof to meet that standard, and proper evidence used in the evaluation of capacity. The attorney representing the party whose capacity is being challenged should be prepared to carefully walk the trial court through the analysis and prevent straying from the applicable standard or introduction of irrelevant evidence. The attorney representing the party that is challenging capacity should be prepared to meet the associated high burden to proof.

The *Higgason* Capacity Standard

In *Marriage of Higgason* [2] the California Supreme Court set forth the two-prong standard by which the trial court is to determine whether a party has the capacity to end his or her marriage. The standard centers on evaluating whether:

1. the party can form the desire to end the marriage, and
2. the party has the ability to express that desire.

As will be discussed further below, this standard is not based on whether an objective observer thinks the marriage should end, or whether there have been objective factors that might justify ending a marriage (e.g., arguments, infidelity). In our no-fault dissolution system, the trial court is not tasked with evaluating whether there are good reasons to end the marriage, but instead whether a party wants the marriage to end.

In *Higgason*, when the parties married, the wife was seventy-three years old and the husband was fourty-eight. Fifteen days after they married, the wife was adjudicated incompetent and a conservator was appointed. About two years later, the wife filed a petition for annulment or dissolution of the marriage. The proceeding was instituted in the wife's name by her guardian ad litem, though the wife signed her petition. The wife also signed two declarations in support of her request for an order to exclude the husband from her home.

At the hearing on the wife's request to exclude the husband, evidence was presented that the wife was ill and confined to bed under a doctor's care. The trial court granted the wife's request, and commented, "The woman [wife] is not insane. She is not without ability to think."

The wife's counsel later took the wife's deposition during which the wife testified to the facts of the marriage and to irreconcilable differences and stated that as far as she was concerned the marriage was over.[3] At the hearing on the petition for dissolution, the wife was unavailable due to health issues, so the deposition testimony was introduced into evidence, and the trial court granted the

wife's petition. A judgment terminating the marital status was later entered.

On appeal, the *Higgason* court addressed the question of whether a party who has diminished capacity may obtain a dissolution of judgment from his or her spouse. In finding such a party can, the *Higgason* court set forth the following two-prong standard:

> Such a proceeding may be brought on behalf of a spouse under conservatorship by and through his or her guardian ad litem, provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so.[4]

As to facts of the case, the *Higgason* court found that the standard set forth above had been met. The trial court had found that the wife was not insane and had the ability to think. The record showed that the wife herself had signed the petition and also two declarations in support of her request for orders. The wife's deposition testimony showed that she desired a dissolution of the marriage. The trial court was not bound by the prior adjudication of incompetency in another proceeding, nor was the trial court bound by proof of her ongoing infirmities. The trial court was required to, and did, weigh the evidence and properly applied the applicable standard.

The *Higgason* court also noted that a guardian ad litem is not a party to the proceeding. A guardian ad litem acts as a representative of a party, and so long as the party has capacity to end one's marriage, then the party's representative can seek that relief. The existence of a conservator or guardian ad litem is not relevant to or determinative of capacity. Capacity to end one's marriage either exists or not with the party.

The Burden of Proof on the Party Challenging Capacity

Marriage of Greenway[5] found that the threshold to meet the *Higgason* capacity standard is "low":

> In light of the above authority, we conclude the mental capacity required to end one's marriage should be similar to the mental capacity required to begin the marriage. As discussed above, the threshold is low. A person under a conservatorship, who is generally without contractual power, may be deemed to have marital capacity. (Prob. Code, § 1900.) And our Supreme Court, in *Higgason*, [citation], held a conservatee could also initiate a dissolution proceeding as long as he or she has the capacity to express that he or she wants to end the marriage.[6]

The *Greenway* court also noted there is a legal presumption that a party has the capacity to end his or her marriage, and placed the burden of proof squarely on the party challenging capacity:

> As mandated by Probate Code section 810, [husband's] diagnosis of dementia is not sufficient in and of itself to support a determination he was of unsound mind or lacked the mental capacity to end his marriage. The trial court correctly started with the baseline presumption [husband] had the capacity to make a reasoned decision to end his marriage, and cited to several facts in the record that supported the presumption.[7]

Greenway provides two rules in determining a party's capacity to end his or her marriage under the *Higgason* standard:

1. It is legally presumed one has capacity to end one's marriage; and
2. The level of evidence needed to prove that capacity is "low".

This places an enormous evidentiary burden on the party challenging capacity. Not only is the initial burden of proof on the moving party, but the party asserting there is capacity need only meet a "low" threshold of proof to prevail. In practice, this means the party challenging capacity must prove there is virtually no evidence of capacity. So, unless the lack of capacity is unequivocal (e.g. petitioner is in a coma or is completely non-communicative due to dementia), the challenging party might have an insurmountable task.

Relevant Evidence

As to evidence regarding capacity, in *Higgason*, the wife was elderly, she was declared incompetent in another proceeding, and she was bed-ridden and ill. However, the trial court properly relied on evidence from the wife (e.g. her declarations and her deposition testimony) rather than on her circumstances in finding she had capacity.

The *Greenway* court framed the inquiry as subjective in nature and not whether there was objective, direct evidence that the marriage has broken down. In other words, the question is not whether the external circumstances show the marriage had broken down, but

rather whether a spouse holds a personal desire to end the marriage:

> [Wife] is critical of the lack of "direct evidence" on this issue and that [husband's] subjective opinion on the irreconcilability cannot be the basis for the judge's decision. Not so. The trial court is the arbiter of the credibility of the witnesses, and it was entitled to believe [husband's] testimony. As stated, "the court must depend to a considerable extent upon the subjective state of mind of the parties" in deciding whether irreconcilable differences exist between the parties to a marriage dissolution petition. [Citation.] Contrary to [wife's] theory, we conclude a marriage can break down without direct evidence of an affair or identifiable major disagreement between the parties. Ending one's marriage is recognized as having an "intensely personal quality." [Citation.] And just as fault is not a relevant consideration, direct proof of objective reasons supporting why one party subjectively believes the marriage is past saving is not required.[8]

In *Greenway* the evidence in the record was well developed, as it should be. It appears the *Greenway* decision includes nearly all – if not all – of the evidence the trial court relied upon, which makes *Greenway* a useful guide for litigating the issue. In its statement of decision, the trial court noted the following:

> There was no evidence to suggest [husband] was not qualified to act as a witness. He was capable of expressing himself [regarding] the matter at issue (the dissolution of his marriage), and [he] appeared to understand his obligations to tell the truth. [Husband] met the qualifications of being a witness (Evidence Code [section] 700). The question before the [c]ourt was whether [husband] was capable of making the reasoned decision to dissolve his marriage. [¶] The following is clear. [¶] [Husband] testified in the presence of his wife, his wife's lawyer, his two lawyers, . . . , the court reporter, and the undersigned. He was examined and cross-examined for approximately 30 minutes. He was able to respond appropriately to the questions he was asked; he was able to read documents; he said he signed Exhibit 2 because his son Guy asked him to sign it; he expressed humor and sarcasm. He reaffirmed his decision to name [his son Kurt] as his health care director and [his CPA] as his attorney in fact for financial issues. At one point during cross-examination he was asked if he were becoming angry and he said yes. [Husband] was wearing hearing aids and did not appear to be ambulatory.[9]

It is important to note that the record in *Greenway* also included the opinion of several experts (a doctor/clinical and forensic psychologist, and of a licensed psychologist) that all reported that the husband was mentally compromised, susceptible to the influence of others, and incapable of exercising the judgment and expressing the wish that his marriage be dissolved. The *Greenway* decision shows that the diagnosis of dementia and reduced cognitive abilities does not mean a person cannot form the desire to end one's marriage. It also shows that expert opinions have little relevance or weight when the experts apply the improper standard to determine capacity of this unique nature.

Greenway has a thorough discussion of the testing and reporting by the experts as to the husband's mental state, but the trial court gave greater weight to the husband's decisions preceding filing the petition and his conduct during testimony at trial. The trial court placed emphasis on the husband's ability at trial to track and answer basic questions about his desire to end the marriage. Husband's inability to satisfy cognitive tests (e.g. comparing a train to a bicycle) was not the deciding factor. *Greenway* upheld the trial court in finding that, despite the experts' opinions regarding overall capacity and diminished functioning, the husband had the specific ability to form a desire to end his marriage and was able to express that desire. Thus, he had capacity to request his marriage be terminated.

Conclusion

Higgason provides the applicable standard for determining capacity to end one's marriage, and *Greenway* sets forth the burdens of proof applicable to that standard. *Greenway* also provides significant guidance on what evidence to consider in evaluating such capacity.

Greenway clearly requires that only a spouse's subjective belief be evaluated, and not the objective circumstances. The trial court cannot substitute its own belief of whether the marriage broke down, or inquire into whether there are objective facts sufficient to conclude

the marriage broke down. This intensely personal, and often private, desire may not be the subject of second-guessing by the trial court. Ending one's marriage is an "intensely personal" decision, and it is not appropriate for the trial court to delve into the basis of the desire, or the motivation to end the marriage.

The subjective inquiry makes sense. Such a determination should focus less on physiological/cognitive factors and more on simple, more personal inquiry. The trial court should be careful with this inquiry as few people with full capacity "understand" all the ramifications of ending one's marriage. There are innumerable confusing issues that arise in such a proceeding, and eliciting knowledgeable responses from a person with full capacity would be difficult (e.g., Do you understand what will happen to your spouse's net carry over losses if you divorce? Do you understand your spouse is entitled to a 2640 reimbursement if you proceed with a divorce?). Otherwise, a party is in a *Catch-22* position of being found incompetent precisely because he/she is asking to end the marriage; i.e., "He/she must lack capacity because only a person who lacks capacity would try to end this marriage."

The scope of evidence might initially seem broad when preparing to challenge capacity, but the attorneys should keep in mind that the trial court might ultimately make the determination based on brief questioning of the party whose capacity is being challenged. Expert testimony is expensive and will not be conclusive, since a non-expert judge can determine if a person appears to be able to form a desire to end his or her marriage and be able to communicate that desire. In both *Higgason* and *Greenway*, the trial court determined capacity without relying on an expert opinion. In *Greenway*, the experts' opinions of incapacity were not accepted by the trial court in keeping with the duty of the trial court to determine the competency of a witness, after observing the witness and evaluating the witness's ability to understand questions that are presented.[10] To the extent expert testimony might assist the trial court in making this decision, the expert's opinion should be limited to two issues: 1) Does the party have the ability to form the desire to end his or her marriage? and 2) Can the party express that desire?

The trial court should also be aware that a wrong determination will force a person who does not want to be married to remain married. A party's fundamental right and freedom of choice – to be married or not – is taken away if the trial court comes to the wrong conclusion. The resulting distress could have an enormous emotional and physical impact on an already weakened party. The trial court might be concerned that if capacity is found to exist, then a party might pursue imprudent litigation and/or a harmful settlement, but these concerns can be allayed through supervision of the guardian ad litem. So, if the trial court is concerned about the result of finding there is capacity, those concerns can be managed through court supervision. Litigating capacity can be extremely costly, so the party challenging capacity should be prepared for the expense to meet the applicable capacity standard and the burden of proof. The challenging party should be prepared for extensive attorneys' fees (including those payable to the other party), expert fees, and the possibility the trial court might decide the issue based on brief, limited questioning. The bottom line is that it will be extremely difficult to prove the spouse does not want to end the marriage, and it may be wise to embrace the inevitable end of the marriage.

Endnotes

1 A respondent does not have to consent to dissolution or have to plead that grounds exist for the dissolution. The petition may allege the grounds for dissolution are irreconcilable differences. *See* Judicial Council Forms f. FL-100 at 5.a.(1). The response allows the respondent to not request a dissolution of marriage, and to deny the grounds of irreconcilable differences. *See* Judicial Council Forms f. FL-120 at 5.b. By not also seeking a dissolution, and by denying there are irreconcilable differences, the respondent positions him/herself to be able to contest the capacity of the petitioner. On the other hand, a vacillating petitioner with capacity might later decide to remain in the marriage and contend the respondent does not have capacity to end the marriage. Either way, the same standards discussed above would apply.

2 *In re* Marriage of Higgason, 10 Cal. 3d 476 (1973).

3 The petitioner's counsel may want to take the petitioner's deposition to ensure that the testimony is preserved if the petitioner is unable to attend a hearing or trial. Petitioner's testimony may be crucial to the issue of capacity, and if petitioner is ill, bed-ridden, or otherwise physically unable to attend court, petitioner's counsel may seek introduction of deposition testimony in lieu of live testimony. Cal. Civ. Proc. Code § 2025.260(c)(2)(C).

4 *Higgason*, 10 Cal. 3d at 483.

5 *In re* Marriage of Greenway, 217 Cal. App. 4th 628 (2013).

6 *Id*. at 643.

7 *Id*. at 646.

8 *Id*. at 652-653.

9 *Id*. at 637-638.

10 Cal. Evid. Code § 701.

Substantively Addressing Substance Abuse

Shannon Wolfrum, CFLS

Shannon K. Wolfrum has been an attorney for 15 years, practicing family law exclusively for the duration of her career. Ms. Wolfrum is a Certified Family Law Specialist. She has served on the Board of Directors of the Family Law Section of the Contra Costa Bar Association for the past five years and is the current President of the Board. She has organized all continuing education on child custody for the past three years for the Contra Costa Bar Association and recently taught a program on child custody for CEB OnDemand. She is a member of California Women Lawyers and the University of California, Berkeley Alumni Association.

The phone rings. Your client is calling to tell you one of those things you do not want to hear:

"I got a second DUI last weekend. My wife doesn't want me around the kids alone anymore," or

"*The school principal called and said the kids' mom smelled like alcohol at school pick-up this afternoon."*

In family law, these statements may not shock us, but there are few primers on how to approach the issue. This article is an overview to assist you in substantively working with your client and the court in relation to substance abuse and child custody.

In late March 2020, during the COVID-19 crisis, alcohol sales in the United States increased by 55% in one week.[1] Internet jokes about alcohol now abound, "When this is all over, I don't know where to go first – AA or Weight Watchers!" Kidding aside, the stress and isolation produced by the COVID-19 crisis and shelter-in-place orders may spark a wave of divorces as has happened in other countries[2] and some of those cases will inevitably include substance abuse issues.

1. Determine the Risk of Actual Harm

In ascertaining the scope of the issue, it is helpful to put aside personal judgment. A client who feels judged is less likely to be candid.

Substance abuse impacts people of all genders, ages, ethnic backgrounds, levels of education, socio-economic situation, and in all geographic locations. A study by the Journal of Addiction Medicine suggests that 1 out of 5 attorneys have an alcohol or drug dependency issue.[3] While we may hear more about alcohol abuse, recreational and medical marijuana, prescribed medications, and illegal drugs are also concerns.

Asking pointed questions may assist in getting a complete picture from a client. What substance is being consumed? How much? How often? What time of day? What days of the week? For how long? How will the parent handle emergencies? Are substances left in a place where a child might accidentally poison themselves? Might a child access the substance for their own use? Is there physical danger to a child? Is the parent/client incapacitated from parenting while using substances?

Another way to obtain important information is to ask, "What do you expect the other parent will say about you?" This question allows a client to be open about their substance abuse and allows clients to view you as helping them. Depending on the answer to this question, you may find the first issue is to suggest resources to the client to address their own problematic use of substances.

2. What Can the Court Do?

Under Family Code section 3011(3)(d), the court may consider: "The habitual or continual illegal use of controlled substances," and "the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substance by either parent. . . . .".

If the substance is *illegal*, the parent need only *use* the substance. With legal substances, the court is concerned with *abuse*.

The difference in treatment of "use" versus "abuse" may be that using an illegal substance is a crime. Also, children may be exposed to other illegal activities. One-time or sporadic use of a substance, even if illegal, may

not invite the court's attention if a party's child has not been impacted.

Family Code section 3011(3)(d) continues, " . . . Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities or nonprofit organizations providing drug and alcohol abuse services . . .".

Evidence a client wishes to use may be inadmissible hearsay. Evidence may need to be evaluated for admissibility under *People v. Sanchez*.[4] Use of certain portions of court-appointed social studies (i.e. child custody evaluations, probation reports) may be limited by *In re Malinda S.*[5] Additionally, under HIPAA,[6] there may be hurdles in procuring records from medical facilities and rehabilitation centers.

Other evidence of use/abuse of substances routinely considered by judges in custody cases include: declarations or live testimony (with a keen eye on witness credibility), a party's admission of substance use/abuse, testimony of third parties, and a conviction within the past five years for the illegal use or possession of a controlled substance.

Family Code section 3011(e)(1) states:

> "Where allegations about a parent pursuant to subsection . . . (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent (accused of substance abuse/use), the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child . . . ."

If a judge determines consideration of an allegation of use/abuse of a substance is warranted, either based on the judge's opinion or because allegations are independently corroborated, then, if the court allows the accused parent parenting time with the child, the court must detail its reasons for the order and tailor the order to protect the child. Orders may include: a prohibition of transporting a child, daytime only parenting time, parent-child contact occur only in public places, supervision by a professional or non-professional supervisor, random testing, or use of a personal alcohol detection mechanism.

3. Testing

Under Family Code section §3041.5, "The Court may order a party to undergo drug/alcohol testing in a child custody matter. Before ordering testing, the court must determine *by a preponderance of the evidence* a party habitually, frequently or continually uses illegal controlled substances or abuses alcohol." [Emphasis added.]

In July 2007, The Administrative Office of the Courts issued a report on Drug and Alcohol Testing.[7] Judicial Officers responding to the statewide survey responded when ordered to undergo testing, 41 percent of litigants complied with the order "very often" and 29 percent complied "often."[8] Judges reported just 23 percent of litigants tested positive "often" or "very often." Although the study was based on responding participants' memory and perception, the study suggests parents ordered to test tend to comply and those who comply may have a better chance of remaining substance-free than litigants who are not monitored by the court.

4. Brief Overview of Case Law on Testing

Wainwright v. Superior Court[9] establishes: 1) testing methods 2) test results are confidential 3) uses of testing results, and 4) the effect of a positive result.

Under *Wainwright* and *Deborah M. v. Superior Court,*[10] although litigants may agree to any type of testing, the court may only order the same testing as required for federal employees.[11] Urine testing is viewed as a less intrusive means than hair testing as, in general, urine tests detect more recent use while hair tests may show short-term use or from several months earlier. Family Code section 3011(d) directs the courts to be concerned with "habitual" and "continual" use rather than remote or sporadic use.

Waignwright requires results of drug tests be confidential. Test results submitted to court must be maintained in a sealed section of the court's file. Attorneys and litigants must not disseminate test results. A breach of confidentiality of results shall be punishable by civil sanctions, not to exceed $2,500.[12] The results of tests in connection with a family law case shall not be used for any other purpose (e.g. not in criminal cases, administrative hearings or civil matters).

When deciding what testing protocol to request, consider:

How long a substance may be detected by a particular test and which tests will reveal use of the problematic substance.

The testing facility should be approved by the court.

The duration, frequency, and cost of testing should be researched and there may need to be an allocation between the parties of the cost of the tests.

Family Code section 3041.5 provides a parent who tests positive has a right to a hearing before a change of custody is ordered. *Heidi S. v. David H.*[13] allows reduction of parenting time based on a positive test without a hearing or an opportunity to challenge the result, if there is no automatic modification of legal or physical custody.[14] Due process requires a hearing to change legal custody from joint to sole legal custody or from joint physical to sole physical custody.

Summary

Parents have a fundamental and constitutionally protected right to parent their children. Addiction and substance abuse are often a product of a parent's trauma, genetics, and social factors. The best family law practitioners are both compassionate and realistic. In choosing to work with cases involving substance abuse allegations, we have a chance to help families heal.

Endnotes

1 Jade Bremner, *US Alcohol Sales Increase 55 Percent in One Week Amid Coronavirus Pandemic,* Newsweek (April 1, 2020), https://www.newsweek.com/us-alcohol-sales-increase-55-percent-one-week-amid-coronavirus-pandemic-1495510.

2 Sheridan Prasso, *Divorces Spike in China After Coronavirus Quarantines,* Bloomburg Businessweek (March 1, 2020), https://www.bloomberg.com/news/articles/2020-03-31/divorces-spike-in-china-after-coronavirus-quarantines.

3 Patrick R. Krill et al, *Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, J. Addiction Medicine, Jan.-Feb. 2016 at 46-52, https://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx.

4 People v. Sanchez, 63 Cal. 4th 655 (2016).

5 *In re* Malinda S., 51 Cal. 3d 368.

6 HIPAA, Health Insurance Portability and Accountability Act of 1996, Pub. L. No.104-191.

7 Drug and Alcohol Testing in Child Custody Cases: Implementation of Family Code Section 3041.5, Administrative Office of the Courts, Center for Families, Children & the Courts (2007).

8 *Id.* at 14-15.

9 Wainwright v. Super. Ct., 84 Cal. App. 4th 262 (2000).

10 *In re* Deborah M. v. Super. Ct., 128 Cal. App. 4th 1181 (2005).

11 *Id.* at 1191-1194.

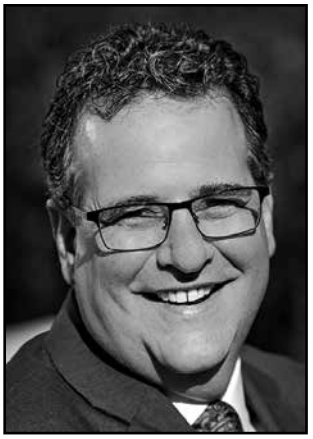
12 Wainwright v. Super. Ct., 84 Cal. App. 4th 262, 268 (2000).

13 Heidi S. v. David H., 1 Cal. App. 5th 1150 (2016).

14 *Id.* at 1174.

Expert Witness Discovery in Family Law Matters: Part II

Stephen D. Hamilton, CFLS



Stephen D. Hamilton has been an attorney for 25 years, with a practice devoted almost exclusively to family law for 23 of those years. He has been a Certified Specialist in Family Law since 2004. He is currently a member of the California Family Law Executive Committee, for which he is the Legislation Chair. He is a member of ACFLS and serves on the ACFLS Outreach and Amicus Committees. He is also chairperson of the San Luis Obispo County Family Law Section.

I. Introduction

Requiring an opposing party to identify the expert witnesses they intend to call at a family law trial is an important part of the trial preparation process. The procedures to request, participate, and object to an expert witness exchange were discussed in Part I of this article.[1]

What you do after receiving a timely expert witness exchange is equally important. This article addresses deposing expert witnesses designated by the opposing party, including the documents which should be requested from the expert. This article also addresses ways to limit expert witness testimony at the time of trial based on a failure of an expert to disclose an opinion at the time of their deposition or inadequacies in the declaration regarding the expert's anticipated trial testimony.

II. Noticing the Deposition of an Opposing Party's Retained or Designated Expert Witnesses

As soon as you receive an opposing party's expert witness list, you need to decide which of their expert witnesses you want to depose. My default answer: all of them. If a case warrants the retention of expert witnesses, it warrants deposing those experts to determine the full extent of their testimony, what demonstrative exhibits they intend to prepare for trial, and to identify the ultimate opinions they will offer at trial. Failing to depose an opposing party's expert witness weakens your client's case and inhibits your ability to limit the expert witness's testimony at trial, as is discussed in Section VI below.

Pursuant to California Code of Civil Procedure section 2034.410, the deposition of an expert witness may be noticed and taken upon "receipt of an expert witness list from a party...". The rules applicable to taking the oral or written deposition of a witness[2] are applicable to expert witnesses, except as specifically provided in the statutes governing expert witness discovery.

A. Deposition Location

The location of the deposition is governed by California Code of Civil Procedure section 2034.420. That section provides an expert's deposition "shall be taken at a place that is within 75 miles of the courthouse where the action is pending." Upon a showing of an exceptional hardship, a more distant location can be used. For the party taking the deposition, this is an important rule. Instead of your client paying you to travel to the expert, the designating party will need to pay for their expert to come to you. However, turnabout is fair play. The same duty can be imposed on your experts. It is not unusual for parties to stipulate that all expert witnesses be deposed where they work or reside. Such a stipulation would make sense where the hourly fee of your expert witness is greater than your hourly fee.

B. Percipient Witnesses

Different rules apply if the expert witness is a "percipient" witness. A percipient witness is one not specifically retained as an expert witness in the case, but who has personal knowledge of facts or information relevant in the case, is qualified to offer expert testimony, and will be asked about their expert opinions at the time of trial. A percipient expert witness is distinguishable from a retained expert witness as they are "not given information by the employing party, but [acquire] it from personal observation...".[3] Examples of a percipient witness in a family law matter include a party's treating health care provider in a case where that party is asserting a disability which prevents them from working, a real estate professional who sold the parties a residence which

is subject to disposition in the marital proceeding, or the party's accountant who prepared their tax returns.

C. Witness Fees for Deposition

A deposing party need only pay an opposing party's retained expert for the time spent at the deposition. "The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert."[4] An expert witness, retained or percipient, must be paid

> the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition. [5]

There are statutory rules that limit, or reallocate, an expert witness's deposition fees:

- If an attorney representing the expert or a non-noticing party is late to the deposition, the tardy counsel must pay the expert's "reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival...".[6]
- A retained expert cannot charge the opposing party a higher hourly fee than they are charging the party who retained them – however an exception is made if the expert donated services to a nonprofit or charitable organization.[7]
- An expert cannot charge a "daily fee" unless they were "required by the deposing party to be available for a full day and the expert necessarily had to forgo all business that the expert would otherwise have conducted that day but for the request that the expert be available all day for the scheduled deposition."[8]

The latter restriction is important. It is not uncommon for both retained and percipient expert witnesses to assert they are entitled to a minimum or daily fee. They are not.

The expert witness's anticipated fee, calculated based on their hourly rate and anticipated length of the deposition, can be paid either with the deposition notice or at the start of the deposition.[9] The fee is to "be delivered to the attorney for the party designating the expert."[10] If the deposition goes past the anticipated time, the noticing party must pay the balance of the expert witnesses fee "within five days of receipt of an itemized statement from the expert."[11]

As a rule, I have always tendered the expert witness fee with the deposition notice. I do so because "[t]he service of a proper deposition notice accompanied by the tender of the expert witness fee described in Section 2034.430 is effective to require the party employing or retaining the expert to produce the expert for the deposition."[12] I also send the fee with the deposition notice for a practical reason – if I forget to bring a check to an expert witness deposition, and did not previously tender the fee, the deposition will not go forward without a stipulation from the other parties.[13]

D. Challenging an Expert Witness's Hourly Rate

Relief can be obtained from the court if it appears the hourly rate of the expert witness is unreasonable. A party can move for an order from the court setting the compensation of an expert witness under California Code of Civil Procedure section 2304.470(a). Notice of the motion (or for a family law case, the request for order) must be given to the expert witness. It must also be preceded by an attempt to meet and confer, with a declaration by counsel pursuant to California Code of Civil Procedure section 2016.040.[14]

Either the expert or counsel, during the meet and confer, must provide: proof of the expert's usual fee, the total number of times the requested fee has been charged and paid, and the "frequency and regularity with which the requested fee has been charged and received by that expert within the two-year period preceding the hearing on the motion."[15] The expert (or counsel) must also provide and the court shall consider "proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation."[16] In determining whether an expert's fee is reasonable, the court can consider what "the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination."[17]

III. Obtaining Documents from the Opposing Party's Retained Expert Witness

As with any deposition, an expert witness is required to produce documents if requested in the deposition notice.[18] This is the singular most important reason, for me, to depose an opposing party's expert witness. In every expert witness deposition, I include the following five requests:

1. Any and all reports, notes, memos, work sheets, and supporting data utilized in connection with the formulation of the deponent's opinion in this case and/or reviewed by the deponent in investigating and reviewing this case.
2. Any and all writings or records which reflect any of the deponent's opinions in regard to this case, including correspondence.
3. Any and all business records which reflect time and effort expended by the deponent in connection with this matter, including, but not limited to, invoices, time sheets, expense reports, or ledger sheets.
4. Any and all outside source materials reviewed or considered by the deponent in formulating any opinions in connection with this matter, including, but not limited to, books, articles, or studies.
5. The deponent's entire file pertaining to this matter, including but not limited to notes, correspondence, research, reports, audio recordings, video recordings, transcripts, electronically stored information, and trial exhibits.[19]

This is by no means the entirety of the documents I seek from an expert, as there may be specific requests tailored to statements made by the witness in declarations or in their expert witness report.

Previously, the adage of "be careful what you ask for" could rear its ugly head. Seeking an expert's "entire file" could result in the production of an unmanageable number of banker boxes at the deposition that could not practically be reviewed during the deposition. That meant it was also impractical to effectively examine the expert witness about the contents of their file. Further, you put a considerable burden on the deposition officer, who now had to take responsibility for photocopying the documents produced by the expert at their deposition. A significant and important change was made to the expert witness discovery statutes in 2017 that alleviated these issues.

The ineffectiveness of this procedure was corrected with the enactment of Assembly Bill No. 2427 in 2016. A new statute was added which requires an expert witness whose deposition has been noticed to produce "no later than three business days before his or her deposition, … any materials or category of materials, including any electronically stored information, called for by the deposition notice."[20]

Based on this change, you now have at least seventy-two hours to review the expert witnesses file and other documents requested in advance of the deposition. The language of California Code of Civil Procedure section 2034.15 also creates an incentive to depose an expert on a Monday, Tuesday or Wednesday. Because the production must occur three "business days" before the deposition, deposing the opposing party's expert witness at the beginning of the business week will give you an additional two days over the preceding weekend to review the documents before the deposition. This allows for a more efficient and effective examination of an expert witness. Instead of wasting your time at the deposition searching through the "haystack" to find the proverbial "needle." It also gives you the opportunity to have your own expert witnesses review the opposing expert witness's file to assist you in formulating questions for the deposition.

IV. Conducting the Expert Witness Deposition

Efficiency is the key for deposing the opposing party's expert witness since your client will be paying for the expert's fee for the deposition. You are very likely not going to have a "gotcha" moment in which the expert witness admits to a flaw or error in one of their opinions. Instead, your goal is to ensure you have made the expert witness disclose all of their expert opinions and the basis for each opinion

This begins with asking the opposing expert witness to identify all expert opinions they intend to offer at trial. You then question the expert witness regarding the basis for each opinion. You should also inquire of the expert regarding the information and specific documents they relied on in formulating each individual opinion.

You should also question the expert regarding all contacts and communications they have had with the party and counsel who retained them, as well as any other parties acting on behalf of the party or counsel (e.g. attorney staff or employees of a community business). It

is not uncommon for an expert witness to not take notes, or only very limited notes, when communicating with the retaining party to eliminate documentation that would be covered by your document request. You should therefore review each entry on the expert's billing statements which refer to communications with the retaining party or counsel during the deposition. Ask the expert witness to confirm the length of the communication, who participated in the communication, and the specific contents of the communication. This includes examining the expert witness about what was discussed with the expert witness during their preparation for their deposition.

Do not conclude an expert witness deposition until you have had them identify all of their opinions. Typically, this means asking the expert witness if they have disclosed all of the opinions they intend to offer at trial during their deposition. You should also ask the expert witness if there are any tasks they have been asked to complete by the retaining party that have not yet been completed. Also ask the expert witness if they are expecting to do any further work in the case.

If an opposing expert witness states they have not completed all of their work in the case and may develop additional opinions for trial, remember the language of California Code of Civil Procedure section 2034.260(4)(c). Under that section, a party's expert witness designation must include a representation that an expert "will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including an opinion and its basis, that the expert is expected to give at trial."

If an expert testifies during their deposition that they may formulate further opinions, solicit an agreement that you will be notified immediately in writing. Also request a stipulation from opposing counsel that the witness will be made available for a further deposition to address the opinions and specific testimony the expert witness will offer at trial that were not disclosed during the expert's deposition.

An expert witness's deposition is also an excellent opportunity to question the expert witness regarding their education, knowledge, training, skill, and experience for purposes of validating their qualifications to offer the opinions they have proffered. An expert witness is only allowed to testify at trial regarding their opinions if:

- The subject matter of their testimony is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact;"[21] and
- The expert's knowledge, skill, experience, training, education, and information made known to the witness before or at the hearing, "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates...".[22]

Exploring the expert witness's credentials at a deposition allows you to decide whether to even request the opportunity to conduct a voir dire of the expert witness pursuant to California Code of Civil Procedure section 720(a).

Many times, it is preferable to not challenge an expert witness's qualifications during trial as you are giving the witness a chance to extol upon their curriculum vitae and bolster their credibility with the trial judge. Questioning the expert witness during their deposition regarding their qualifications eliminates that opportunity at trial. Or you may discover the expert witness is not qualified to offer the opinions they are rendering and be able to exclude their testimony altogether by conducting an effective voir dire at trial.

V. Turning an Opposing Party's Expert Witness Into Your Expert Witness

Although it happens infrequently, occasionally an expert witness designated by the opposing party may have opinions which are favorable to your client. This can result due to the late retention of the expert or the failure of opposing counsel to provide the expert witness with all relevant documents before that expert issues their initial written report.

When this circumstance occurs, the opposing party may withdraw the previously designated expert witness. However, if you have deposed that expert witness, you will be able to call them as a witness at trial on behalf of your own client. "A party may call as a witness at trial an expert not previously designated by that party if … [t]hat expert has been designated by another party and has thereafter been deposed…".[23]

VI. Limiting the Testimony of the Opposing Party's Expert Witness at Trial

Although objections to an expert witness's trial testimony based on the designation or the witness's deposition can be made during trial, they can also be addressed by way of pretrial motions. A motion in limine is an effective tool in attempting to limit or prevent an

opposing expert witness's testimony. The California Lawyers Association has available an on-demand webinar which addresses use of motions in limine in family law cases.[24]

A successful motion in limine to bar the testimony of non-designated expert witnesses or to limit the testimony of a designated expert witness to the opinions expressed by the expert witness at their deposition can be extremely effective at resolving an action at the beginning of a trial. If opposing counsel knows they will not be able to introduce expert testimony on a critical issue, they are likely to be more willing to resolve issues that could not be settled before trial. The following cases provide authority for limiting expert witness testimony at trial.

A. Bonds v. Roy

In *Bonds v. Roy*, the California Supreme Court addressed when you could exclude an expert witnesses testimony due to defects in either the opposing expert witness declaration or omissions made during the expert witness's deposition.[25] A review of that decision provides excellent guidance on how to limit, or altogether eliminate, the testimony of an opposing party's expert witness.

In *Bonds v. Roy*, a medical malpractice action, the defense designated an orthopedic surgeon who was expected to testify regarding damages. During his deposition, the orthopedic witness testified he had been retained to offer testimony on "basically, two things. One, is to evaluate the disability of Mr. Bonds at the time I saw him. And the other was to evaluate how much disability he was [having] prior to the surgery, based on the records."[26] However the orthopedic surgeon specifically stated he did not expect "to be giving any testimony or any opinion concerning the standard of care issues that might be involved in this case."[27]

At trial, and during the afternoon recess of the last day of testimony, defense counsel attempted to expand the scope of the orthopedic surgeon's testimony to include opinions regarding the "standard of care."[28] The trial court rejected this attempt to expand the expert witnesses testimony beyond what was disclosed in the expert witness declaration and deposition testimony and because there was "not enough time to adjourn and take his deposition." The trial court also found any expansion of the orthopedic surgeon's testimony "would be unfair, prejudicial, and a surprise to Bonds."[29]

The trial court's ruling was affirmed by both the Court of Appeal and the California Supreme Court. Although the *Bonds v. Roy* decision focused on the expert designation requirements, a significant factor which supported the trial court's ruling, as well as the reviewing courts affirming the ruling, was the fact the expert witness specifically denied he would be offering any opinions concerning the standard of care during his deposition.

B. *Kennemur v. State of California*

Another important decision addressing limitation of expert witness testimony at trial is *Kennemur v. State of California*.[30] In *Kennemur*, a personal injury action arising from a motor vehicle accident, a defense expert witness testified at trial regarding seatbelt mechanics (and how it impacted the plaintiff's injuries due to not wearing a seatbelt at the time of the accident) as well as causation. Plaintiff then tried to call other expert witnesses to rebut the testimony of the defense expert.

The trial court rebuffed those attempts, and articulated and explained the difference between impeachment testimony (which can be admitted without compliance with the expert witness discovery provisions)[31] and rebuttal testimony (which is governed by the expert witness discovery rules).[32]

As explained in *Kennemur*, impeachment testimony is not synonymous with rebuttal testimony. Impeachment testimony is testimony that "call[s into] question the veracity of a witness, by means of evidence adduced for such purpose, or the adducing of proof that a witness is unworthy of belief."[33] So if an expert witness is being untruthful, or offers an opinion so outrageous no other reasonable expert would offer a similar opinion, a non-designated expert witness could testify to impeach the other expert's testimony.

Rebuttal testimony differs from impeachment testimony in that rebuttal testimony is when an expert witness attempts to contradict the testimony of another party's expert witness. If the purported impeachment testimony from a non-designated witness does not provide "reasons why the opposing expert's foundational fact was false or nonexistent," it is rebuttal testimony and should be excluded.[34]

C. *Jones v. Moore*

The importance of deposing an expert witness was elevated with the decision in *Jones v. Moore*.[3355] In that legal malpractice action, the defendant obtained

a judgment on special verdict after the jury found the defendant had not been negligent. This occurred after the trial court excluded the testimony of the plaintiff's expert witness on the issue of the standard of care.

Although the expert witness designation for plaintiff's expert witness included a broad description of the testimony the expert witness would give at trial,[36] during his deposition the expert witness was examined and testified as follows:

> Any other areas in which you believe [defendant] fell below the standard of care in representing [plaintiff]?" Oyler [the plaintiff's expert witness] replied, "Not that I'm prepared to testify to at this time." Counsel inquired whether Oyler anticipated doing any further work on the matter to arrive at any other opinions. Oyler said, "No, but if I do, you will be notified well in advance, so as to be able to properly exercise your discovery rights. [37]

The expert witness did not notify defense counsel of any additional opinions prior to trial.

At trial, the expert witness repeated the opinions he offered during his deposition. He was then asked a question by plaintiff's counsel if he had an opinion regarding whether the defendant's failure to obtain additional security fell below the standard of care. Because the expert witness had not disclosed such an opinion during his deposition, defense counsel objected on the grounds the question called for an opinion outside the scope of the expert witness's deposition testimony. The trial court excluded the testimony. The Court of Appeal confirmed the exclusionary ruling was correct.

> While plaintiff's expert witness declaration regarding Oyler arguably was broad enough to encompass his testifying regarding ways in which defendant breached the standard of care after the further judgment was entered, in his deposition he testified as to certain specific opinions, said those were his only opinions, and if he had others he would notify defense counsel.
>
> ...
>
> When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial.[38]

This ruling demonstrates the importance of deposing an opposing party's expert witnesses, particularly where the expert witness declaration is broad and general. Had plaintiff's expert not been deposed in *Moore*, defense counsel would have been unsuccessful in limiting the expert's testimony at trial.

VI. Conclusion

Obviously, many family law cases do not warrant the use of expert witnesses. However, when effective representation requires expert witness opinion testimony be submitted on behalf of your client, it also warrants conducting expert witness discovery. Knowledge of the rules governing expert witness depositions will assist you in presenting the most effective case for your clients. Limiting the testimony of opposing experts through an effective expert witness deposition can decimate your opposing counsel's case and help you to achieve the best possible outcome for your client at trial.

Endnotes

1 Stephen Hamilton, *Expert Witness Discovery in Family Law Matters: Part 1*, Fam. L. News Issue 1 2020 (2020).

2 *See* Cal. Civ. Proc. Code §§ 2025.010, et seq. (oral depositions); Cal. Civ. Proc. Code §§ 2026.010, et seq. (written depositions).

3 Hurtado v. W. Med. Ctr., 222 Cal. App. 3d 1198, 1203 (1990).

4 Cal. Civ. Proc. Code § 2034.440.

5 Cal. Civ. Proc. Code §§ 2034.430(a),(b).

6 Cal. Civ. Proc. Code § 2034.430(c).

7 Cal. Civ. Proc. Code § 2034.430(d).

8 Cal. Civ. Proc. Code § 2034.430(e).

9 Cal. Civ. Proc. Code § 2034.450(a).

10 Cal. Civ. Proc. Code § 2034.450(b).

11 Cal. Civ. Proc. Code § 2034.450(c).

12 Cal. Civ. Proc. Code § 2034.460(a).

13 Cal. Civ. Proc. Code § 2034.460(b).

14 Cal. Civ. Proc. Code § 2034.470(b).

15 Cal. Civ. Proc. Code §§ 2034.470(b)(1)-(3).

16 Cal. Civ. Proc. Code § 2034.470(c).

17 Cal. Civ. Proc. Code § 2034.470(e).

18 Cal. Civ. Proc. Code § 2025.220.

19 I started my legal career representing plaintiffs in personal injury cases. I would regularly observe the same experts offering the same opinions in every case. So my "base" set of document requests also sought evidence of other payments received by the expert from parties represented by the same defense counsel as well as the overall amount of their income derived from expert witness testimony. This was a great way to ferret out the "opinion for hire" expert and undermine their credibility.

20 Cal. Civ. Proc. Code § 2034.415.

21 Cal. Evid. Code § 801(a).

22 Cal. Evid. Code § 801(a); *see also* Cal. Evid. Code § 720.

23 Cal. Civ. Proc. Code § 2034.310(a).

24 Hamilton & McCall, *Use of Motions in Limine in Family Law Proceedings* California Law. Ass'n (2018), https://cla.inreachce.com/Details/Information/0c0980d8-e6b4-491b-bcea-40e948c78d52.

25 Bonds v. Roy, 20 Cal. 4th 140 (1999).

26 *Id.* at 143.

27 *Id.*

28 *Id.*

29 *Id.*

30 Kennemur v. California, 133 Cal. App. 3d 907 (1982).

31 Cal. Civ. Proc. Code § 2034.310(b).

32 The discussion in this part of the article was guided by an excellent presentation: Evan C. Itzkowitz, CFLS, *Stopping the Other Side's Story – Kennemur & Other Evidence Exclusions* Trial Advocacy Institute, American Academy of Matrimonial Lawyers (AAML), So. Cal. Ch. (2020).

33 *Kennemur*, 133 Cal. App. 3d at 921, (citing *impeach*, Black's Law Dictionary (5th ed. 1979)).

34 *Kennemur*, 133 Cal. App. 3d at 925.

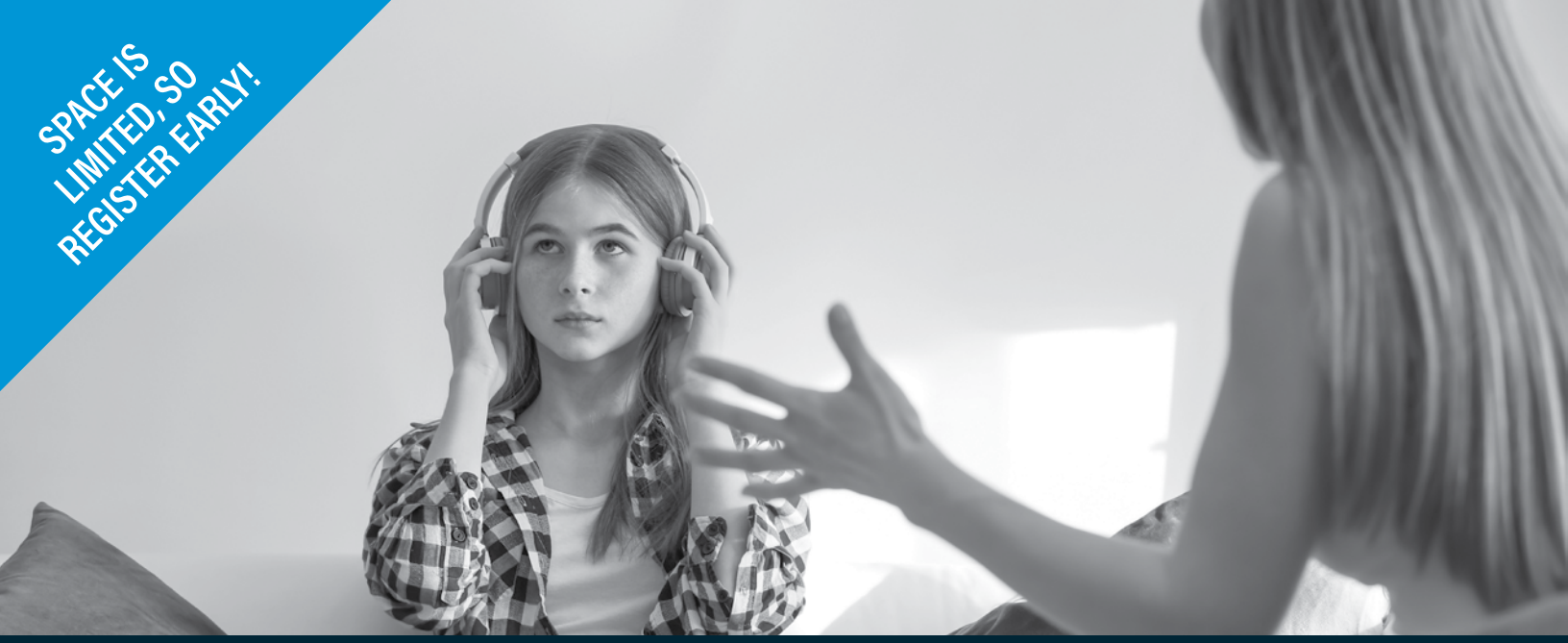
35 Jones v. Moore, 80 Cal. App. 4th 557 (2000).

36 *Id.* at 562-563.The expert witness designation stated the expert would "testify as to the handling of the underlying dissolution of marriage proceedings including, but not limited to: the standard of care for attorneys practicing in the field of family law and Defendant's failure to meet that standard in the underlying dissolution of marriage proceedings; his opinions concerning settlement and the stipulated '[further judgment on reserved issues]'; the failure to handle the dissolution proceedings for Plaintiff in a manner which would have resulted in a fair and secure division of community property; the lack of security for the $500,000.00 'equalizing' promissory note; the reasons Defendant's conduct fell below the standard of care for attorneys handling such dissolution actions and the causation or effect of such handling, through Defendant's actions and/or omissions, on the losses and expenses [plaintiff] incurred and/or became subject to pay."

37 *Id.* at 563.

38 *Id.* at 565-566.

SPACE IS LIMITED, SO REGISTER EARLY!



I DARE YOU TO PARENT ME:

From Problem to Solution in Refuse/Resist Cases

Annual Custody Seminar

Friday, September 18, 2020

Arden Hills Spa & Club
Sacramento, CA

Co-Sponsored by the Association of Family and Conciliation Courts - California Chapter (AFCC -CA): Association of Certified Family Law Specialists (ACFLS): California Lawyers Association Family Law Section, and Bartholomew & Wasznicky LLP

Early Registration: $200 per person

Registration after 9/1/2020: $250 per person

** No refunds will be made for cancellations after 9/13/2020*

For registration materials and continuing education information, contact Lindie Newlin at (916) 455-5200 or e-mail Lindie@DivorceWithRespect.com.

Family Law News Editorial Team

Executive Editor
Nathan W. Gabbard
nathan@tlfamlaw.com

Assistant Editor
Louise Fightmaster
louise@fightmastermediation.com

BJ Lee
bjlee@bjleefamilylaw.com

Craig Pedersen
csp@molfamlaw.com

Editorial Board Advisor
Andrew Cain

Production Coordinator
Megan Lynch
Sublime Designs Media
megan@sublimedesignsmedia.com
www.sublimedesignsmedia.com

Family Law Section Executive Committee

Officers
Stephen Montagna, CFLS
Chair

Leena S. Hingnikar, CFLS
Vice Chair

Demetria Graves, CFLS
Secretary

Justin O'Connell, CFLS
Legislation Chair

Avi Levy, CFLS
Treasurer

CYLA Representative
Sharmeela Kawos

Members
Tiffany Andrews, CFLS

Jillian Atuegbu, CFLS

Roz Bateman Smith

Louise Bayles-Fightmaster, CFLS

Robin Birnbaum, CFLS

Nathan W. Gabbard, CFLS

Michelle Kazadi, CFLS

Billie-Jean Lee, CFLS

Alexandra O'Neill Muller

Craig S. Pedersen

Kelly Robbins, CFLS

Anthony Storm

Advisors
Michele B. Brown, CFLS

Dianne M. Fetzer, CFLS

Stephen D. Hamilton, CFLS

David M. Lederman, CFLS

John Nieman

Sherry J. Peterson, CFLS

Melinda A. Sammis, CFLS

Diane Elizabeth Wasznicky, CFLS

Section Coordinator
Erin Ravenscraft
Phone: (916) 516-1710

Legislative Liaisons and Designated Recipients of Legislation

Adoption/Art Liaison
Co-Chair: Robert Walmsley
Jarrette & Walmsley
2901 Grand Ave Ste E,
Los Olivos, CA 93441
Phone: (805) 697-7390
Fax: (805) 697-7410
Email: Robert@jarrettewalmsley.com

Regional Liaison — Los Angeles
Chair Roger Rombro, Rombro & Associates,
3405 N Sepulveda Blvd Ste 200,
Manhattan Beach, CA 90266-3650
Phone Number: (310) 545-1900
Fax Number: (310) 802-8849
Email: roger.rombro@rombrolaw.com

Vice Chair Alphonse F. Provinziano
Provinziano & Associates
8888 W Olympic Blvd Ste 203,
Beverly Hills, CA 90211-3617
Phone: (310) 820-3500
Fax: (310) 651-2001
Email: al@provinziano.com

Regional Liaison — Inland Empire
Chair: Chandra L. Moss
Holstrom, Block and Parke
1897 California Ave., Ste. 102
Corona, CA 92881
Phone: (951) 734-6371
Fax: (951) 734-8832
Email: cmoss@hbplaw.com

Regional Liaison — Sacramento
Chair: Jessica Abdollahi
Cordell & Cordell
500 Capitol Mall, Ste 2060,
Sacramento, CA 95814-4754
Phone: (916) 248-5900
Fax: (916) 848-0278
Email: Jabdollahi@cordelllaw.com

Regional Liaison - San Diego
Chair: Naghmeh Bashar
10531 4S Commons Dr, Unit #110,
San Diego, CA 92127
Phone: (619) 261-8085
Email: naghmehbashar3@gmail.com

Regional Liaison - Santa Clara
Co-Chair: B.J. Fadem
111 North Market Street, Suite 910
San Jose, California 95113
Phone: (408) 280-1220
bjfadem@fademlaw.com

Co-Chair: Sharon Roper
191 N 1st St,
San Jose, CA 95113-1006
Phone: (408) 882-2932

Regional Liaison - North Bay
Susan Barrett
Conner, Lawrence, Rodney, Olhiser & Barrett, LLP,
829 Sonoma Ave,
Santa Rosa, CA 95404
Phone: (707) 523-0480
sbarrett@clrob.com

FAMILY LAW

CALIFORNIA LAWYERS ASSOCIATION

California Lawyers Association
Family Law Section
400 Capitol Mall
Suite 650
Sacramento, CA 95814

PRSRT STD
U.S. POSTAGE
PAID
DOCUMATION

Time-Sensitive Material